OPINIONS BELOW.

The majority and dissenting opinions of the United States Court of Appeals for the Second Circuit are not yet reported, and are printed in Appendix A to this Petition. The opinion of the United States District Court for the Eastern District of Pennsylvania is found at 169 F. Supp. 677 and is printed (together with the said court's order of transfer) in Appendix B to this Petition. The opinion of the United States District Court for the Southern District of New York is found at 175 F. Supp. 793 and is printed in Appendix C to this Petition.

JURISDICTION.

The judgment of the Court of Appeals was entered on February 21, 1961. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

QUESTION PRESENTED.

In a private antitrust action instituted by petitioner in the Eastern District of Pennsylvania, the District Court determined that venue was improper as to the defendant-respondents and pursuant to 28 U. S. C. § 1406(a), severed and transferred the action as to them to the Southern District of New York where venue was proper. The District Court for the Southern District of New York dismissed the action as against respondents for lack of jurisdiction on the ground that the District Court for the Eastern District of Pennsylvania did not have personal jurisdiction over them and therefore had no power to order the transfer. The Court of Appeals for the Second Circuit affirmed. The question presented by this petition is whether the District

Court for the Eastern District of Pennsylvania, having jurisdiction over the subject matter of the instant action, had the power to transfer the case for improper venue under 28 U. S. C. § 1406(a) without having obtained personal jurisdiction over the transferred respondents?

STATUTES INVOLVED.

Section 1406(a) of 28 U. S. C. provides as follows:

> The district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought.

Section 12 of the Clayton Act, 38 Stat. 736, 15 U. S. C. § 22 provides as follows:

> Any suit, action, or proceeding under the antitrust laws against a corporation may be brought against a corporation may be brought not only in the judicial district whereof it is an inhabitant, but also in any district where it may be found or transacts business; and all process in such cases may be served in the district of which it is an inhabitant, or wherever it may be found.

...Y
...T. U. S.

FILED
MAY ... 1961
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

October Term, 1960.

No. 931

GOLDLAWR, INC.,

Petitioner,

v.

MARCUS HEIMAN, SELECT OPERATING CORPORATION and UNITED BOOKING OFFICE, INC.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

EDWIN P. ROME,
1660 Suburban Station Building,
Philadelphia 3, Pennsylvania,
Counsel for Petitioner.

MORRIS L. WEISBERG,
GONCER M. KRESTAL,
BLANK, RUDENKO, KLAUS & ROME,
Of Counsel.

International, 711 So. 50th St., Phila. 43, Pa.

RECEIVED
MAY ...
OFFICE OF THE CLERK
SUPREME COURT, U. S.

INDEX.

	Page
Opinions Below	2
Jurisdiction	2
Question Presented	2
Statutes Involved	3
Statement of the Case	4
Reason for Allowing Writ	6
I. The Court of Appeals Has Imposed an Unwarranted and Unduly Restrictive Interpretation Upon an Important Federal Procedural Statute	6
II. The Decision Below Conflicts With Decisions of the Fourth, Ninth and District of Columbia Courts of Appeals	10
Appendix A—Opinion of the United States Court of Appeals for the Second Circuit	1a
Appendix B—Opinion of the United States District Court for the Eastern District	20a
Order (3/3/59)	42a
Order of Transfer (3/3/59)	43a
Appendix C—Opinion of the United States District Court for the Southern District of New York	44a

TABLE OF CASES CITED.

	Page
Amerio Contact Plate Freezers, Inc. v. Knowles, 274 F. 2d 590 (1960)	10, 11
Goldlawr, Inc. v. Heiman, 273 F. 2d 729	5
Hayes v. Livermont, 279 F. 2d 818 (1960)	10
Hohensee v. News Syndicate, Inc., 286 F. 2d 527 (1961)	10
Internatio-Rotterdam, Inc. v. Thomsen, 218 F. 2d 514 (4th Cir. 1955)	6, 8, 10, 11, 12
Lumbermens' Mut. Cas. Co. v. Mohr, 87 F. Supp. 727 (S. D. Tex. 1949)	10
Orion Shipping & Trading Co. v. United States, 247 F. 2d 755 (1957)	10
Radovich v. National Football League, 352 U. S. 445 (1957)	9
Schiller v. Mit-Clip Co., 180 F. 2d 654 (2d Cir. 1950)	11, 12
United States v. Shubert, Civil Action 56-72, United States District Court for the Southern District of New York, 1956 Trade Cases, paragraph 68, 272	4

STATUTES AND AUTHORITIES CITED.

	Page
Automobile Dealers Act, 15 U. S. C. § 1222	8
Clayton Act, as amended (33 Stat. 736):	
Section 4, 15 U. S. C. § 15	5, 8, 9
Section 5(b), 15 U. S. C. § 16(b)	4, 9, 12
Section 12, 15 U. S. C. § 22	3, 4, 5, 8, 9
Copyright Act, 28 U. S. C. § 1400(a)	8
Federal Employers' Liability Act, 45 U. S. C. § 56	8
Federal Rules of Civil Procedure:	
Rule 3	12
Rule 25(a)(1)	5
Rule 54(b)	5
Interlocutory Appeals Act, 28 U. S. C. § 1292(b)	5
Investment Companies Act, 15 U. S. C. § 80a-43	8
Judicial Code (1948 Revision):	
Section 1404(a), 28 U. S. C. § 1404(a)	7
Section 1406(a), 28 U. S. C. § 1406(a)	2, 3, 5, 6, 7, 10, 11, 12
1 Moore, Federal Practice, para. 0.146(5), p. 1908, at n. 11 (2d ed. 1960)	10
1 Moore, Federal Practice, para. 0.146(6), p. 1910 (2d ed. 1960)	7
2 Moore, Federal Practice, para. 3.07(5), p. 787, at n. 4	12
Public Utilities Companies Act, 15 U. S. C. § 79y	8
Securities Act of 1933, 15 U. S. C. § 77(v)	8
Securities Exchange Act of 1934, 15 U. S. C. § 77aa	8
Senate Report No. 303, 81st Cong. 1st Sess., U. S. Code Cong. Serv. 1253 (1949)	7
Sherman Antitrust Act, Sections 1 and 2 (15 U. S. C. §§ 1 and 2)	4
Taft-Hartley Act, 29 U. S. C. § 160(e), (f), (j)	8
28 U. S. C. § 1254(1)	3
28 U. S. C. § 1391(c)	8
28 U. S. C. § 1391(d)	8
28 U. S. C. § 1395	8

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1960.

No.

GOLDLAWR, INCORPORATED,

Petitioner,

v.

MARCUS HEIMAN, SELECT OPERATING CORPORATION AND UNITED BOOKING OFFICE, INC.,

Respondents.

PETITION FOR A WRIT OF CERTIORI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

Goldlawr, Incorporated, petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit.

STATEMENT OF THE CASE.

This is a private antitrust action brought pursuant to Sections 1 and 2 of the Sherman Antitrust Act (15 U. S. C. §§ 1 and 2) against Jacob Shubert and several other persons and corporations identified with the Shubert interests in the legitimate theatre business. Petitioner, which operates a legitimate theatre in the City of Philadelphia, alleged injury to its business as a result of defendants' nation-wide monopoly and conspiracy to unreasonably restrain commerce in the legitimate theatre business and sought treble damages and an injunction. The action was instituted by petitioner in the District Court for the Eastern District of Pennsylvania on October 17, 1956,[1] within one year after the entry of the consent decree in United States v. Shubert, Civil Action 56-72, United States District Court for the Southern District of New York, 1956 Trade Cases, paragraph 68, 272, in order to secure the benefits of Section 5(b) of the Clayton Act (15 U. S. C. § 16(b)), providing for the tolling of the statute of limitations during the pendency of a government action.

Service was originally made upon all defendants at the Shubert's Philadelphia office. Subsequently respondents, Select Operating Corporation and United Booking Office, Inc., were also served in New York City by means of alias summonses as provided by Section 12 of the Clayton Act, 15 U. S. C. § 22. Certain of the defendants, including respondents, filed motions to dismiss for lack of jurisdiction and improper venue and to quash the returns of service,

1. A second complaint with almost identical allegations, but which added certain defendants not here involved and extended the period of which damages were sought, was filed on February 18, 1957. At the same time petitioner amended the original complaint to include the extended damage period. The two actions were consolidated in the Southern District of New York after transfer. Appellant's Appendix in the Court of Appeals, p. 6a and will be treated as one case for the purpose of this Petition.

claiming they resided and transacted business only in New York City. The District Court for the Eastern District of Pennsylvania denied the motions as to some of the defendants, but as to others, including respondents, held that venue in the Eastern District of Pennsylvania was improper, under Sections 4 and 12 of the Clayton Act (15 U. S. C. §§ 15 and 22), on the ground that these defendants did not reside, have agents, or transact business in the Eastern District of Pennsylvania. However, instead of dismissing the case against these defendants, the court "in the interest of justice" severed and transferred the action as against them to the Southern District of New York pursuant to Section 1406(a) of the Judicial Code.

After transfer, respondents once again moved to dismiss the action for lack of jurisdiction,[2] and, on January 27, 1960, the District Court for the Southern District of New York granted the motion, holding that the respondents were not properly served while the case was pending in the Eastern District of Pennsylvania and, therefore, the district court there had no power to transfer the case. The Court of Appeals for the Second Circuit, Judges Moore and Waterman, affirmed;[3] Judge Hincks dissented.

---

2. At the same time, petitioner moved to substitute as defendants the executors of the Estate of Marcus Heiman, who had died while the District Court for the Eastern District of Pennsylvania was considering the motions to dismiss. The courts below in addition to holding that the Eastern District of Pennsylvania had no power to transfer the case as to Heiman as well as the corporate respondents, also held that the executors could not be substituted pursuant to Rule 25(a)(1) of the Federal Rules of Civil Procedure. The remaining transferred defendants, Sylvia W. Golde, Milton Shubert and William Klein did not move to dismiss the action and the case is still pending against them in the Southern District of New York.

3. The appeal was taken pursuant to the Interlocutory Appeals Act 28 U. S. C. § 1292(b). An earlier appeal was held to be improperly taken pursuant to Rule 54(b) of the Federal Rules of Civil Procedure, but the court afforded the petitioner an opportunity to proceed under Section 1292(b). *Goldlawr, Inc. v. Heiman*, 273 F. 2d 729.

REASON FOR ALLOWING WRIT.

Certiorari should be granted to review the decision of the United States Court of Appeals for the Second Circuit in the instant case because:

(1) there is involved an important question concerning the operation of the federal judicial system which has not been decided by this Court, and

(2) the Court's construction of Section 1406(a) of the Judicial Code is in conflict with the decisions of the Court of Appeals for the District of Columbia and the Fourth and Ninth Circuits.

I. The Court of Appeals Has Imposed an Unwarranted and Unduly Restrictive Interpretation Upon an Important Federal Procedural Statute.

The Congressional purpose in enacting Section 1406(a) as part of the 1948 revision of the Judicial Code was a liberalizing one. Previous thereto a district court was required to dismiss an action where venue was laid in the wrong district. Section 1406(a), as amended,[4] gives the court the choice of either dismissing the action or "in the interest of justice" transferring the case to a district where venue is proper. This purpose is "in accord with modern standards of procedure, the purpose of which is to get away from time-consuming and justice defeating technicalities."[5]

The Court of Appeals for the Second Circuit, however, purporting to rely on the Congressional history of Sec-

---

4. Section 1406(a), as originally enacted in 1948, required the district court to transfer an action in which venue was improperly laid. The 1949 amendment gave the court the discretion to dismiss or, in the interest of justice, transfer.

5. Chief Judge Parker in *Internatio-Rotterdam, Inc. v. Thomsen*, 218 F. 2d 514, 517 (4th Cir. 1955).

tion 1406(a)[6] held that a district court cannot transfer an action "in the interest of justice," even when venue is improper, unless the court has personal jurisdiction over the defendant sought to be transferred. No such limitation on the exercise of Section 1406(a) is expressly found in the Judicial Code and the Congressional reports do not consider the question now before the Court. As Judge Hincks noted in his dissent below, such a requirement is "wholly without Congressional sanction and reads into § 1406 a restriction on salutary procedural provision which is not there. And a careful reading of its Congressional history does not suggest to me that such a restriction was intended."[7] It is therefore petitioner's contention that Section 1406(a) authorizes a district court to transfer any action in which it has jurisdiction over the subject matter, even though the court has not acquired personal jurisdiction over the defendant, and that the decision of the court below is unwarranted and unduly restrictive.[8]

---

6. Chiefly Senate Report No. 303, 81st Cong. 1st Sess., U. S. Code Cong. Serv. 1253 (1949). The court below also relied on the cases interpreting sections 1404(a) of the Judicial Code, 28 U. S. C. § 1404(a). Section 1404(a) is a codification of the common law doctrine of forum non conveniens and in applying this doctrine it has been customary to require the transferring court to have personal jurisdiction over the defendant. Furthermore, Section 1404(a) permits transfer only when venue is proper, although inconvenient, and, therefore, serves a completely different purpose than Section 1406(a). For these reasons, the cases under 1404(a) are not relevant to the construction of Section 1406(a).

7. Appendix A, p. 19a.

8. Despite respondent's contentions below, Section 1406(a) will not be subject to abuse if this interpretation is accepted. Respondents' argument to this effect was effectively met by Judge Hincks:

> ". . . I am not impressed by the procedural spectres which they conjure up to bolster this argument. I do not suggest that a transfer by a court without personal jurisdiction will 'cure' the jurisdictional defect; the defendants will have to be properly served before their substantive rights would be affected. And in any event, if a plaintiff attempts to make improper use of the Act in the court 'in the interests of justice' may refuse to order the transfer." Appendix A, pp. 17a-18a.

See also 1 *Moore, Federal Practice*, para. 0.146(6), p. 1910 (2d ed. 1960).

Furthermore, this decision may have far reaching effect not only for private suitors under the antitrust laws,[9] but for all litigants bringing suit under the many federal statutes governed by similar venue provisions which allow the institution of suit in a district where the defendant is found or transacts business.[10] Cases instituted pursuant to these statutes, constitute an important segment of federal litigation, both in amount and character and, for the most part, are in areas where there is a Congressional policy to encourage and facilitate government and private suits.

---

9. In addition to Section 12 of the Clayton Act which prescribes the venue for corporate defendants, Section 4 sets forth equally broad venue provisions with respect to individual defendants. 15 U. S. C. § 15.

10. The following types of federal cases are governed by special venue provisions permitting the institution of suit in a district wherein the defendant is found or transacts business.

(a) Actions for recovery of fines, penalties or forfeitures. 28 U. S. C. § 1395.

(b) Actions under the Copyright Act. 28 U. S. C. § 1400 (a).

(c) Libels in Admiralty. *Internatio-Rotterdam, Inc. v. Thomsen*, 218 F. 2d 514 (4th Cir. 1955).

(d) Actions under the Securities Act of 1933, 15 U. S. C. § 77(v).

(e) Actions under the Securities Exchange Act of 1934, 15 U. S. C. § 77aa.

(f) Actions under the Public Utilities Companies Act, 15 U. S. C. § 79y.

(g) Actions under the Investment Companies Act, 15 U. S. C. § 80a-43.

(h) Actions under the Automobile Dealers Act, 15 U. S. C. § 1222.

(i) Actions under the Taft-Hartley Act, 29 U. S. C. § 160 (e), (f), (j).

(j) Actions under the Federal Employers' Liability Act, 45 U. S. C. § 56.

The general federal venue statute also contains similarly liberal venue provisions governing civil actions against alien defendants, 28 U. S. C. § 1391(d) and corporate defendants, 28 U. S. C. § 1391(c).

In all such cases the decision below would prohibit transfer and require dismissal even though the plaintiff believed in good faith that he was commencing suit in a district where venue was proper and process could be served, and the district court decided in the interest of justice to transfer the case to a district where venue was proper. The hardship this decision can cause a plaintiff is illustrated quite clearly in the instant case. Petitioner's complaint was filed in the Eastern District of Pennsylvania [11] within one year of the entry of a consent decree in a government suit alleging similar antitrust violations, thereby entitling petitioner to the benefit of the tolling of the statute of limitations under Section 5(b) of the Clayton Act, 15 U. S. C. § 16(b). Through no fault of the petitioner, the district court's decision that venue was improper with respect to respondents was rendered over two years later. By that time the larger part of the petitioner's claim was barred by the statute of limitations and, unless the transfer is upheld, will be unrecoverable without any consideration as to the merits thereof.

This result is contrary to the Congressional policy, as demonstrated by the liberal venue [12] and tolling [13] provisions, to facilitate the private antitrust suitor's prosecution of his claim against alleged antitrust violators and the teaching of this Court in *Radovich v. National Football League*, 352 U. S. 445, 454 (1957) that: "in the face of such a policy this Court should not add requirements to burden the private litigant beyond what is specifically set forth by Congress in those [antitrust] laws." A view more con-

---

11. Petitioner's good faith in instituting the action in the Eastern District of Pennsylvania is demonstrated by the fact that the District Court upheld petitioner's contentions that some of the New York's defendants were represented in Philadelphia and only rejected them with respect to respondents after long deliberation and study of the facts.

12. Sections 4 and 12 of the Clayton Act, 15 U. S. C. §§ 15 and 22.

13. Section 5(b) of the Clayton Act, 15 U. S. C. § 16(b).

sistent with this policy is expressed by Judge Hincks who, in his dissenting opinion below, pointed out that the avoidance of the excision of a significant period of damages was a reason "in the interest of justice" why the transfer should have been found proper.[14]

It is submitted, that the decision of the court below with respect to the construction and scope of Section 1406(a) does unduly burden the private litigant without express Congressional authority and, therefore, raises an important question of Federal law which should be decided by this Court.

II. The Decision Below Conflicts With Decisions of the Fourth, Ninth and District of Columbia Courts of Appeals.

The Fourth Circuit in *Internatio-Rotterdam, Inc. v. Thomsen*, 218 F. 2d 514 (1955), the Ninth Circuit in *Orion Shipping & Trading Co. v. United States*, 247 F. 2d 755 (1957), and the District of Columbia Circuit in *Amerio Contact Plate Freezers, Inc. v. Knowles*, 274 F. 2d 590 (1960) and *Hayes v. Livermont*, 279 F. 2d 818 (1960), have approved transfers under Section 1406(a) where venue is laid in a wrong district without regard to the existence in the transferor district of jurisdiction over the transferred parties.[15]

The rule set forth in these cases is succinctly stated in the following excerpt from the opinion of the Court of Appeals for the District of Columbia in the *Amerio* case (274 F. 2d at 591):

---

14. Appendix A, p. 18a. See also 1 *Moore, Federal Practice* para. 0.146(5), p. 1908, at n. 11 (2d ed. 1960).

15. See also *Lumbermens' Mut. Cas. Co. v. Mohr*, 87 F. Supp. 727 (S. D. Tex. 1949). The Court of Appeals for the Third Circuit in *Hohensee v. News Syndicate, Inc.*, 286 F. 2d 527 (1961) has taken the same position as the court below.

> . . . The court had jurisdiction of the subject matter, and the defect of venue could be cured by transfer. The court's lack of jurisdiction over the person of the defendant is immaterial. . . .

The Fourth Circuit noted in *Internatio-Rotterdam, Inc. v. Thomsen* (218 F. 2d at 516) that the power of transfer under 1406(a) was not any less because process had not been served, "when failure to make the transfer may result not only in inconvenience but also in denial of justice to one of the parties." The court rejected the contention that no transfer order can be entered until personal jurisdiction has been acquired thusly:

> . . . This argument fails, however, to distinguish between acquiring jurisdiction over the proceedings commenced before the court and acquiring jurisdiction over person or property; and it is the former, not the latter with which we are concerned here. Certainly the court has no power to enter judgment against person or property until process has been duly served, but it by no means follows that it is without power to enter orders in the cause which are necessary to the maintenance of the litigation itself. . . .

These cases are diametrically opposed to the decision of the court below and this conflict could not be avoided by the court in its opinion. In fact, the only reason given for refusing to follow the *Amerio* case was that the Court of Appeals for the District of Columbia had misapplied the Second Circuit's own decision in *Schiller v. Mit-Clip Co.*, 180 F. 2d 654 (2d Cir. 1950). In the *Schiller* case, the Court of Appeals dismissed an appeal from an order transferring a case under Section 1406(a), even though the transferor court did not have personal jurisdiction over the defendant. The majority opinion below notes that the defendant in *Schiller* had waived the jurisdictional defect and that the case therefore provides no basis for the holding in *Amerio*

that a district court has power under section 1406(a) to transfer a case without personal jurisdiction over the defendant. However, as pointed out by Judge Hincks, the *Schiller* decision is likewise no authority for the instant case, since the court therein "even if it did not pass upon the validity of a transfer made without personal jurisdiction, as least, allowed such a transfer to stand".[16]

Although Judges Moore and Waterman did attempt to distinguish the Fourth Circuit's decision in *Internatio-Rotterdam v. Thomsen, supra*, on the ground that it was limited to admiralty actions,[17] they were forced to recognize that Chief Judge Parker's opinion in *Internatio* was based not upon any special admiralty rule, but upon the interpretation of Section 1406(a) expressly rejected by them.[18]

It is submitted, therefore, that a conflict does exist between the various Courts of Appeals concerning the construction and scope of Section 1406(a) of the Judicial Code which conflict should be resolved by this Court.

---

16. Appendix A, p. 16a.

17. In the course of his opinion in *Internatio*, Chief Judge Parker had stated that, since the mere filing of a libel in admiralty stops the running of the statute of limitations even without seizure of the ship, there was a quasi-jurisdiction in the transferor court to enter orders appropriate to the issuance of process, including the transfer of the case to a district where service of process could be effected. The court below intimated that this was not true in civil cases other than in admiralty and pointed out that Judge Parker had in his opinion distinguished *Internatio* in this respect from "a civil action based on diversity."

This is not a diversity case, however, but one founded upon the federal antitrust laws and, therefore, *Internatio* is not distinguishable from the instant case for the reason given. Pursuant to section 5(b) of the Clayton Act, as amended, 15 U. S. C. § 16(b), a cause of action under the antitrust laws is not barred if "commenced" within the specified time. A civil action is commenced in the federal courts by "filing a complaint with the Court" (Rule 3, Federal Rules of Civil Procedure), and the running of the statute of limitations is stopped thereby even though there has been no service of process. See cases cited in 2 *Moore, Federal Practice* para. 3.07(5), p. 787, at n. 4.

18. Appendix A, p. 11a.

For the reasons set forth certiorari should be granted.

Respectfully submitted,

Edwin P. Rome,
Counsel for Petitioner.

Morris L. Wexner,
Gordon M. Kessel,
Blank, Rudenko, Klaus & Rome,
1600 Suburban Station Building,
Philadelphia 3, Pennsylvania,
Of Counsel.

APPENDIX A.

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

Before: HINCKS, WATERMAN and MOORE, *Circuit Judges.*

Appeal under 28 U. S. C. § 1292(b) from an order of the United States District Court for the Southern District of New York, Edmund L. Palmieri, *Judge*, dismissing an antitrust action against the appellees because of improper transfer under 28 U. S. C. § 1406(a) and denying plaintiff-appellant's motion to substitute the executors of a defendant who had died never having been served.

Affirmed.

HAROLD E. KOHN, Philadelphia, Pa., (Curtis Mallet-Prevost, Colt & Mosle, New York City, Dolores Korman and Dilworth, Paxon, Kalish, Kohn & Dilks, Philadelphia, Pa., on the brief), *for plaintiff-appellant.*

AARON LIPPER, New York City (Lipper, Shinn & Keeley, and Richard B. Dannenberg, New York City, on the brief), *for Morgan Guaranty Trust Company and Asher Levy, Executors of the Estate of Marcus Heiman, Deceased.*

C. RUSSELL PHILLIPS, Philadelphia, Pa. (Gerald Schoenfeld, Bernard B. Jacobs, Lipper, Shinn & Keeley, New York City, Hugh G. Moulton, and Montgomery, McCracken, Walker & Rhoads, Philadelphia, Pa., on the brief), *for defendants-appellees, Select Operating Corporation and United Booking Office, Inc.*

MOORE, *Circuit Judge:*

Pursuant to leave granted by this Court (March 7, 1960); 28 U. S. C. § 1292(b)), plaintiff, Goldlawr, Incorporated (Goldlawr), appeals from an order (January 27, 1960) dismissing the complaints in two actions filed jointly in the Southern District of New York against Select Operating Corporation (Select) and United Booking Office, Inc. (UBO) "for lack of jurisdiction over the persons of such defendants." Goldlawr also appeals from the order as to the defendant, Marcus Heiman, deceased, which dismissed for lack of personal jurisdiction and denied its motion to substitute the Executors of the Estate of Marcus Heiman as defendants.

By orders entered in the United States District Court for the Eastern District of Pennsylvania (the Pennsylvania court), these two cases against Select, UBO and certain individuals originally filed in Pennsylvania[1] were transferred "in the interest of justice" to the Southern District of New York (the New York court) "conformably to 28 U. S. C. A. § 1406(a)."[2] Thereafter, Select, UBO and four individual defendants, appearing specially, moved to dis-

---

1. Suit originally was instituted on October 17, 1956, in Philadelphia. Alias summonses were served on Select and UBO in New York City. A second suit was filed in Philadelphia on February 18, 1957. The order transferring both cases to New York was dated March 3, 1959. Amended complaints were thereafter served. The amended complaint in New York omitted the defendants as to whom venue had been found to be proper in Pennsylvania; the amended complaint in Pennsylvania omitted those defendants as to whom the actions had been transferred to New York.

The defendant Marcus Heiman died on September 9, 1957, after the Pennsylvania motion to dismiss had been argued but before the order of transfer had been entered.

2. § 1406. Cure or Waiver of Defects.

"(a) The district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought." June 25, 1948, c. 646, § 1, 62 Stat. 937; May 24, 1949, c. 139, § 81, 63 Stat. 101.

miss for five reasons: (1) that there had been no service of process on Select or UBO subsequent to the transfer; (2) that there had been no valid service of process on Select or UBO prior to transfer; (3) that without jurisdiction over Select or UBO the Pennsylvania court had no power to order the transfer; (4) that the New York court did not acquire jurisdiction because the transfer was illegal; and (5) that the Pennsylvania court had failed to rule on the motions there made to dismiss for lack of jurisdiction.

The court below held that it "lacks personal jurisdiction over the defendants since effective service of process has never been accomplished." However, it recognized that if transfer were authorized, plaintiff might make proper service in New York, hence determination of the validity of the transfer was necessary on the theory that " if the transfer to this District were authorized, plaintiff might still be in a position to avoid dismissal by making proper service upon defendants without further delay." (175 F. Supp. 793, 796.) It is appropriate therefore for the transferee court or the Court of Appeals of the transferee district to inquire into the propriety of the transfer. See *Hoffman v. Blaski, et al.*, 363 U. S. 335 (1960), by implication; *Arrowhead Co. Inc. v. The Aimee Lykes*, 2 Cir., 1951, 193 F. 2d 83.

Goldlawr, operating a theatre in Philadelphia, sued Select, UBO, the individual defendants and others not involved in this appeal under Sections 1 [3] and 2 [4] of the Sherman Act and Sections 4 [5] and 16 [6] of the Clayton Act, alleging a conspiracy to restrain and monopolize interstate commerce, demanding treble damages and seeking an injunction against the continuance of defendants' allegedly unlawful acts.

---

3. 15 U. S. C. 1, July 2, 1890, c. 647, § 1, 26 Stat. 209; Aug. 17, 1937, c. 690, Title VIII, 50 Stat. 693.

4. 15 U. S. C. 2, July 2, 1890, c. 647, § 2, 26 Stat. 209.

5. 15 U. S. C. 15, Oct. 15, 1914, c. 323, § 4, 38 Stat. 731.

6. 15 U. S. C. 26, Oct. 15, 1914, c. 323, § 16, 38 Stat. 737.

Section 12 of the Clayton Act,[7] 15 U. S. C. 22, specifies where suit against a corporation under the antitrust laws may be brought, namely, in a district where it is an inhabitant and also where "it may be found or transacts business." Conversely, it should follow that if a corporation is not an inhabitant of, is not found in, and does not transact business in, the district, suit may not be so brought. By statutory grant if suit is brought as prescribed in this section "all process in such cases may be served in the district of which it [the corporation] is an inhabitant, or wherever it may be found." Thus, "in such cases," Congress has seen fit to enlarge the limits of the otherwise restricted territorial areas of process. In other words, the extraterritorial service privilege is given only when the other requirements are satisfied.

Upon a motion to dismiss in the Pennsylvania Court, the court held that Select and UBO were not inhabitants of the district or found or transacting business there. However, instead of ruling that therefore the suit could not be brought in the Pennsylvania district, the court, relying on Section 1406(a), 28 U. S. C., treating the motions as "Motions to Dismiss for Improper Venue," ordered the suits transferred to New York (*Goldlawr, Incorporated v. Shubert*, D. C. E. D. Pa., 1958, 169 F. Supp. 677).

The substance of the decision appealed from is that "the privilege of extraterritorial service is expressly confined to actions brought in a district in which the corporation is an inhabitant, found, or transacting business"; that these conditions have not been met and therefore personal jurisdiction was not achieved by service of the alias summonses in New York; that Section 1406(a) which "speaks to defective venue only, cannot be made to do service when

---

7. "Any suit, action, or proceeding under the antitrust laws against a corporation may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business; and all process in such cases may be served in the district of which it is an inhabitant, or wherever it may be found." Oct. 15, 1914, c. 323, § 12, 38 Stat. 736.

there is also a jurisdictional defect"; that proper jurisdiction is a basic requirement; and that a Congressional intent to cure jurisdictional defects cannot be found in a mere venue transfer provision. (175 F. Supp. 793). Goldlawr has not here, either in the brief or on oral argument, challenged the determination that the transfer court did not have personal jurisdiction over appellees.

The motion to substitute the heirs of Marcus Heiman was denied and the cross-motion to dismiss for lack of jurisdiction was granted because no personal jurisdiction had ever been obtained as to Heiman before or after the transfer order and because of doubt that Rule 25(a)(1), Fed. R. Civ. P. authorized executor substitution under such circumstances.

It has long been established that federal courts should not assume jurisdiction to decide cases merely because it would be constitutional for Congress to have given them the jurisdiction they seek to exercise. See generally Hart and Wechsler, *The Federal Courts and the Federal System*, 1953, pp. 288-340. "Courts created by statute can have no jurisdiction but such as the statute confers." *Sheldon v. Sill*, 49 U. S. 440, 449 (1850). Jurisdiction, over the subject matter and over the person, has been a basic concept of our jurisprudence. Although a defendant may have full knowledge that an action has been commenced against him, a court, nevertheless, lacks jurisdiction to enter a judgment against him unless jurisdiction over his person has been obtained in strict compliance with a statute designating the method of obtaining such jurisdiction. *Wuchter v. Pizzutti*, 276 U. S. 13 (1928). The balancing of competing interests which is involved in determining jurisdictional issues has been repeatedly emphasized by the Supreme Court. *Pennoyer v. Neff*, 95 U. S. 714 (1877); *McDonald v. Mabee*, 243 U. S. 90 (1917); *Hess v. Pawlowski*, 274 U. S. 352 (1927); *Milliken v. Meyer*, 311 U. S. 457 (1940); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U. S. 306 (1950). Because the concept of the power of a court to act and affect the rights of a party is so fundamental, jurisdiction of

courts to act should be based on clear legislative pronouncements. And just as their jurisdiction authority is given to the courts by the legislature, so also must legislative limitations be expanded or removed by the same process. Section 1406(a) provides for the transfer of cases when venue is improper. It does not mention jurisdictional defects. Whatever be the desirability of a rule that a district court may transfer a case when venue is mislaid and jurisdiction over the person of the defendant is lacking, it is an unwarranted exercise of judicial interpretation to find that a statute, expressly providing for transfer to cure a venue defect, impliedly provides for a transfer to cure a more basic jurisdictional defect. The lesser does not by implication include the greater.

The legislative history of Section 1406(a) indicates that the draftsmen never disclosed any belief that in promulgating a provision for transfer in the event of improper venue, they also intended their creation to make transfer possible where jurisdiction is lacking. Section 1406(a) "radically altered prior law" (Moore's Commentary on the Judicial Code, p. 195). Prior to its enactment when venue was found defective, dismissal of the action was mandatory. *Camp v. Gress*, 250 U. S. 308, 316 (1919); *Schoen v. Mountain Producers Corp.*, 3 Cir., 1948, 170 F. 2d 707, 713. Considering the revolutionary character of the change, courts ought to demand a plain expression of the innovation and ought not extend it any further than the statutory language clearly warrants. See *Robertson v. Railroad Labor Board*, 268 U. S. 619, 627 (1925); *Foster-Milburn Co. v. Knight*, 2 Cir., 1950, 181 F. 2d 949, 952. There is no indication, however, in the Congressional history behind the 1948 enactment that would suggest that the section is addressed to anything more than a venue defect.

Section 1406(a) as originally enacted required transfer when venue was improperly laid, but because it was recognized that litigants might abuse the section by purposely bringing an action in a district where venue was improper,

in 1949 Congress amended the section to make transfer discretionary "in the interest of justice." The Senate Report explaining the amendment impliedly evidences a Congressional intent that a prerequisite to the operation of the section is that the court have personal jurisdiction over the parties. The report states:

> "It is thought that the provision [the 1948 version of § 1406(a)] may be subject to abuse in that plaintiff might deliberately bring a suit in a wrong division or district *where he could get service on the defendant*, and when the question of venue is raised the court is required to transfer the case to the court where it could have been brought. However, in the meantime, *service has been perfected on a defendant in the wrong venue*, and it will carry over into the new (and proper) venue." [Emphasis added.] Sen. Rep. No. 303, 81st Cong., 1st Sess., U. S. Code Cong. Serv. 1253 (1949).

Although this statement does not explicitly address itself to a suit in the wrong district where no service can be obtained, implicitly it appears to express a Congressional recognition that section 1406(a) is to be operative only after valid "service on the defendant" giving the court personal jurisdiction.

Goldlawr takes the position that the section does not specifically require personal jurisdiction before transfer and argues that judicial ingenuity should be used to liberalize the statute by decisions that jurisdiction is not required. While it is true that Congress could have provided for the transfer in the absence of personal jurisdiction over defendants, it has not done so.

The scope of judicial authority should not be lightly extended in the absence of a clear statutory basis. While not relevant to the present appeal in its actual holding, *Miner v. Atlass*, 363 U. S. 641 (1960), is nevertheless a warning that federal courts should proceed with caution when considering the merit of implying basic procedural innovations. Although a liberal transfer statute might be

wise, such a change is more properly a subject for legislative action after "mature consideration of informed opinion from all relevant quarters, with all the opportunities for comprehensive and integrated treatment which such consideration [legislative] affords." *Miner v. Atlass, supra,* p. 650.

Chapter 87, Title 28, United States Code, enacted into positive law, by its organization, is persuasive of the conclusion that Congress did not intend section 1406(a) to be more than a statute making it possible for the court to cure venue, not jurisdictional, defects. Chapter 87 is titled "District Courts; Venue" and includes sections 1391 to 1406. Most of the sections dictate venue requirements and specify that a failure to comply with them will be deemed a defect which impedes the cause from going to final adjudication. However, a venue defect can be waived and section 1406 is entitled "Cure or Waiver of Defects." The placement of the section at the end of Chapter 87 suggests that the defects it is to be used to cure are defects caused by failure to comply with the basic sections of the chapter. These are venue defects and not jurisdictional ones.

Furthermore, Goldlawr concedes that under section 1404(a),[8] a legislative sibling to section 1406, "there must be jurisdiction and venue in the transferring district as well as in the district to which the case is transferred." But if jurisdiction is necessary under section 1404(a) which permits transfer for convenience of parties and witnesses so also should this requirement be met when the transfer is made for improper venue. Although the reason for the transfer is different in the two sections, they are under the same general venue heading and there is no indication whatsoever that Congress thought it was dealing with an entirely different subject in section 1406(a).

---

8. § 1404. Change of venue.

"(a) For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought." June 25, 1948, c. 646, 62 Stat. 937.

It was merely providing for a way in which to cure a venue defect.

How has it come to pass that Section 1406(a), clear enough in its language and intent, has been now held out as authorizing transfer without personal jurisdiction?

The cases, directing transfer under section 1406(a) despite a lack of personal jurisdiction over the defendant, indicate that the view that the section authorizes transfers even in the absence of personal jurisdiction over the defendant had its genesis in a misconception of the holding of this Court in *Schiller v. Mit-Clip Co.*, 2 Cir., 1950, 180 F. 2d 654. For example, in *Petroleum Financial Corp. v. Stone*, S. D. N. Y., 1953, 116 F. Supp. 426, the court expressed serious doubts as to the propriety of transfer under Section 1406(a) when the transferor court did not have personal jurisdiction over the defendant, but in supposed compliance with *Schiller* granted the transfer. *Petroleum Financial Corp. v. Stone, supra*, has been criticized for misconstruing *Schiller*. (38 Minn. L. Rev. 874 (1954).) The unwarranted construction of the statute based on *Schiller* has gained currency by virtue of repetition. Later cases supposedly following *Schiller* include *United States v. Welch*, S. D. N. Y., 1957, 151 F. Supp. 899 (citing only *Schiller*); *Orzulak v. Federal Commerce and Navigation Co.*, E. D. Pa., 1958, 168 F. Supp. 15 (resting in part on *Petroleum Financial Corp. v. Stone, supra*, an offspring of *Schiller* and an admiralty case, see *infra*); *Amerio Contact Plate Freezers, Inc. v. Knowles*, D. C. Cir., 1960, 274 F. 2d 590 (citing *Schiller* and its progeny, *Petroleum Finance Corp. v. Stone, supra*, and *United States v. Welch, supra*, along with two admiralty cases, *Internatio-Rotterdam, Inc. v. Thomsen*, 4 Cir., 1955, 218 F. 2d 514 and *Orion Shipping & Trading Co. v. United States*, 9 Cir., 1957, 247 F. 2d 755 (in which it appears the district court had jurisdiction)).[9]

---

9. *Lumbermens Mut. Casualty Co. v. Mohr*, D. C. S. D. Texas, 1949, 87 F. Supp. 727, is a case in which the district court having found a jurisdictional defect nevertheless ordered a transfer under section 1406(a). There is no recognition in the opinion of the problem raised by the jurisdictional defect.

The recent pronouncement in *Amerio Contact Plate Freezers, Inc., supra,* that personal jurisdiction is immaterial, merely assumes the existence of such a doctrine based upon *Schiller* and the subsequent cases which in turn revealed no analysis supporting the conclusion. Similarly, *Hayes v. Livermont,* D. C. Cir., 1960, 279 F. 2d 818, filed only several months after *Amerio* and by the same court, merely relies on that case and *Internatio-Rotterdam, Inc., v. Thomsen, supra,* an admiralty case.

Schiller cannot correctly be accepted, as it appears it mistakenly has been, for the proposition that section 1406(a) authorizes transfer in the absence of personal jurisdiction of a defendant. In that case the defendants moved to dismiss for lack of personal jurisdiction and improper venue. It was the court which *sua sponte* ordered the transfer. However, on appeal the plaintiff objected to the transfer and the defendant argued in support of the transfer. In assessing that case, it must be recognized that personal jurisdiction requirements are for the benefit of defendants. If a defendant chooses to waive such jurisdictional objections, he may. Thus, any learning to be derived from *Schiller* in regard to Section 1406(a) must be limited to cases in which the defendant may be said to have waived his right to object to the jurisdiction of the transferor court by arguing for the transfer. No such waiver of jurisdictional objections here exists.

The line of cases which have not entirely relied upon *Schiller* are the admiralty cases led by *Internatio-Rotterdam, Inc. v. Thomsen, supra.* In *Internatio-Rotterdam,* the transferor court was in the Southern District of New York during the period of a series of successive misconstructions of *Schiller.* Furthermore, while the transferor court did not have full jurisdiction of the respondent, it did possess a type of quasi jurisdiction peculiar to libels in admiralty. In its opinion, the Fourth Circuit stressed that the Judicial Code applies to suits in admiralty (*Ex Parte Collett,* 337 U. S. 55 (1948)), and that in admiralty cases a libel may

be filed against a ship in a district in which is located a port at which the ship on the high seas is soon expected and the action is then deemed to be instituted for purposes of meeting the requirement that the action be commenced within the short one-year period of 46 U. S. C. 1303(6). 218 F. 2d at page 515-516; *Ore Steamship Corp. v. D/S A/S Hassel*, 2 Cir., 1943, 137 F. 2d 326, 329. During the period between the filing and the time the ship actually reaches port so that it may be attached and thus be subjected to jurisdiction in *in rem* proceedings, the admiralty court traditionally has had a quasi jurisdiction to enter "orders as may be appropriate with respect to the issuance or service of process." (218 F. 2d at page 516.) If such traditional power exists in the Admiralty Court, and as to that there may be serious doubt, no such tradition can be found in civil cases. Judge Parker was careful in *Internatio-Rotterdam* to limit his discussion to admiralty cases, and pointed out, "A suit in admiralty must be distinguished in this respect [commencement of suit] from a civil action based on diversity of citizenship in which venue is limited by statute." (See 68 Harv. L. Rev. 1069 (1955).) *Orzulak v. Federal Commerce and Navigation Co., supra,* previously considered as a case resting in part on *Schiller,* is also an admiralty case.

The greatest respect and deference must be accorded to the words of the late Chief Judge John Parker who would have the purpose of modern standards of procedure "to get away from time-consuming and justice-defeating technicalities" and would have "The Courts of the United States comprise one great system for the administration of justice." (*Internatio-Rotterdam, Inc. v. Thomsen, supra,* at page 517.) This may well be the legal Utopia in which we should be entitled to live. In "one great system" possibly there should be no restrictions upon obtaining jurisdiction throughout the system. Why should service be restricted to the State in which the district is located? Why should not service of a summons by mail anywhere in the United States be adequate? Why should service upon specified

officers of corporations be necessary? And certainly the bar of a statute of limitations to a highly meritorious suit filed one day too late or the loss of the right to appeal because of a filing on the 31st day are seemingly "justice-defeating technicalities." Yet the collective wisdom of our lawmakers has both formulated and maintained these rules. From time to time liberalizing measures have been enacted as to methods of service but almost invariably after legislative deliberation. Therefore, short of some legal millennium, jurisdictional limitations are a reality.

Addressing themselves to the question of whether a district court may transfer an action under section 1406(a) when the conditions are that the court lacks jurisdiction over the person of the defendant as well as there existing a defect in venue, several judges of this circuit, along with Judge Palmieri below, have concluded that the section warrants no such construction. *Independent Products Corp. v. Loew's, Inc.*, S. D. N. Y., 1957, 148 F. Supp. 460, 462; *Fistel v. Beaver Trust Co.*, S. D. N. Y., 1950, 94 F. Supp. 974, 976; cf. *First National Bank of Chicago v. United Air Lines*, 7 Cir., 1951, 190 F. 2d 493, 496, cert. den. 341 U. S. 903, cert. subsequently granted 342 U. S. 875, rev'd on other grounds, 342 U. S. 396 (1952);[10] Semble under 28 U. S. C. 1404(a), *Hargrove v. Louisville & Nashville Ry.*

---

10. Subsequent to the argument of this case, the Third Circuit decided *Hohensee v. News Syndicate, Inc.*, 3 Cir., Feb. 8, 1961 — F. 2d —, noted at 29 LW 2399. The court held that a district judge lacks the power to transfer an action under section 1406(a) when he does not have jurisdiction over the defendant. In speaking of section 1406(a) the court states:

> "The sole purpose of this section as well as its companion, 28 U. S. C. § 1404, was to provide a means for curing a defect in venue whether it be improperly laid or improper because of the inconvenience of the parties. • • • We are satisfied that section 1406 was never intended to serve as a means of avoiding the consequences of a failure to perfect service of process. It would take a clear congressional mandate for this court to allow that section to be used as a shorthand method for assisting a party to effect jurisdiction of the person."

Co., W. D. Ky., 1957, 153 F. Supp. 681; *McDaniel v. Drotman*, W. D. Ky., 1952, 103 F. Supp. 643; *Wilson v. Kansas City So. Ry.*, W. D. Mo., 1951, 101 F. Supp. 56; *cf. Scarmardo v. Mooring*, S. D. Tex., 1950, 89 F. Supp. 936; see U. Cinn. L. Rev. 357 (1954).

Goldlawr expresses the fear that if the district court here is upheld that section 1406(a) will never be applicable to corporate defendants in antitrust cases. Section 1406(a) as part of the general venue statutory provisions was not enacted to aid or impede antitrust cases. Congress eased the problem of commencing an antitrust action and of obtaining jurisdiction over defendants in a district in which venue is properly laid through the passage of section 12 of the Clayton Act. Goldlawr's real difficulty here is that it has failed to meet the requirements of that section

The determination that section 1406(a) does not authorize a district court to transfer a case when it merely finds venue has been improperly laid but does not have personal jurisdiction over the defendant is not at all prompted by a belief that a contrary rule would be undesirable. Convincing policy arguments can be marshalled for a more liberal transfer statute, although abuses can be imagined if the construction urged by Goldlawr were accepted, but these arguments should be made to the legislature. If after due consideration of such policies and of all competing views the broader transfer statute be thought to be desirable, a section which specifically provides for the procedural innovation might be favorably received by Congress. Any attempt by the courts to enact by their decisions so radical a procedural innovation, particularly where the effect of such decisions is to narrow the requirement of jurisdiction over the person, would invade legislative territory. See *Miner v. Atlass*, *supra*.

In passing, it is noted that even if the Pennsylvania District Court did have the authority under 28 U. S. C. 1406(a) to transfer the case in the absence of personal jurisdiction over the defendants, as we hold it did not, the

transfer might well have been defective as to defendant Heiman because he died prior to the attempted transfer and no administrator was appointed to represent him in this litigation until after the invalid transfer. See Fed. Rules of Civ. Pro. 25(a)(1); *United States v. Field*, C. C. S. D. N. Y., 1859, 25 Fed. Cas. 1067. Because the validity of the transfer as to all appellees is disposed of on other grounds, that matter need not be pursued.

As Judge Palmieri pointed out, the transferor court being unauthorized to order the transfer under section 1406(a), the only alternatives for the transferee court are to remand the case back to the transferor or to dismiss. Since it has already been determined that venue is improper in Pennsylvania, it would be a sterile gesture to remand the action to be transferred back to the District Court for the Eastern District of Pennsylvania.

The judgment below is affirmed.

HINCKS, *Circuit Judge* (dissenting in part):

I agree with my brothers that the order below as to Heiman should be affirmed. See *United States v. Field*, C. C. S. D. N. Y., 25 Fed. Cas. 1067.

But I would hold that the transfer was proper as to Select and United, notwithstanding the absence of effective personal service on them in Pennsylvania. It was so held in *Amerio Contact Plate Freezers v. Knowles*, D. C. Cir., 274 F. 2d 590, in an opinion which was entered after the opinion below. The court there said, in speaking of such a transfer, "The courts lack of jurisdiction over the person of the defendant is immaterial." This holding was followed in *Hayes v. Livermont*, D. C. Cir., 279 F. 2d 818. And in *Internatio-Rotterdam, Inc. v. Thomsen*, 4 Cir., 218 F. 2d 514, it was so held. To be sure, *Internatio* was an admiralty case and the appellees urge that its holding must be re-

stricted to admiralty cases. I do not agree. There the power of transfer prior to any service was held to be authorized under 28 U. S. C. § 1406(a). In speaking of a situation in which when the libel was filed neither a proper respondent nor property was within the transferor district but a vessel was expected shortly to appear, Judge Parker said:

> "When suit is so instituted, which has the effect of preserving the rights of libellant against the running of the statute, and the vessel does not appear in the district as anticipated but does appear or is expected to appear in another district, it seems clearly within both the letter and the spirit of 28 U. S. C. § 1406(a) to transfer the case, in the interest of justice, as having been brought in the wrong district, since the vessel cannot be served there and must be served before the case can proceed."

Often in actions at law the situation is not significantly different. When a complaint is filed in a particular district the complications of fact and uncertainties of law may be such that the plaintiff cannot be sure that venue or service of process in the district will be sustained (much as a libelant cannot be sure that an expected vessel will arrive in the district). When after long controversy it is adjudicated that the venue is improper, as was the case here, I think "the letter and spirit of 28 U. S. C. § 1406(a)" just as in the *Internatio* situation requires a transfer to a district in which venue can be properly laid and the defendant can be served. The policy underlying transfers in admiralty cases is equally applicable to actions at law. As Judge Parker, in *Internatio*, so well said:

> "Certainly such transfer is in accord with modern standards of procedure, the purpose of which is to get away from time-consuming and justice-defeating technicalities and secure an adjudication of the rights of

the parties by as direct and as expeditious a route as possible. The courts of the United States comprise one great system for the administration of justice."[1]

Numerous district court decisions reach the same result. *Orzulak v. Federal Commerce and Navigation Co.*, D. C. E. D. Pa., 168 F. Supp. 15; *United States v. Welch*, D. C. S. D. N. Y., 151 F. Supp. 899; *Petroleum Fin. Corp. v. Stone*, D. C. S. D. N. Y., 116 F. Supp. 426 (transfer under § 1404(a)); *Lumbermans Mut. Cas. Co. v. Mohr*, D. C. S. D. Texas, 87 F. Supp. 727; *Schiller v. Mit-Clip Co., Inc.*, D. C. S. D. N. Y., unreported, appeal dismissed 180 F. 2d 654.[2]

---

1. I agree with the judge below and with my brothers that the decision of this court in *Schiller v. Mit-Clip*, 180 F. 2d 654, does not speak to the precise question now raised although other cases have given *Schiller* a more expansive reading. But after all, this court in *Schiller*, even if it did not pass upon the validity of a transfer made without personal jurisdiction, at least allowed such a transfer to stand.

2. Personal jurisdiction over the defendant was held at least by implication to be a prerequisite to a § 1406(a) transfer in *Independent Productions Corp. v. Loew's, Inc.*, D. C. S. D. N. Y., 148 F. Supp. 460, 467. See *Pistel v. Beaver Trust Co.*, D. C. S. D. N. Y., 94 F. Supp. 974 (unclear whether ruling based on 1406(a) or 1404(a)). Several cases have held personal jurisdiction a prerequisite to transfer under 1404(a), *McDaniel v. Drotman*, D. C. W. D. Ky., 103 F. Supp. 643; *Hargrove v. Louisville & N. R. R.*, D. C. W. D. Ky., 153 F. Supp. 681; *Wilson v. Kansas City So. Ry.*, D. C. W. D. Mo., 101 F. Supp. 36; *Scarmardo v. Mooring*, D. C. S. D. Tex., 89 F. Supp. 936; *In re Josephson*, 1 Cir., 218 F. 2d 174, 185 (not "in the interests of justice" to transfer under 1404(a) before transferor court obtains personal jurisdiction).

However, since 1404(a) is the statutory articulation of the doctrine of *forum non conveniens*, these cases may be based on the historical fact that that doctrine was not applicable "if there is absence of jurisdiction," *Gulf Oil Corp. v. Gilbert*, 330 U. S. 501, 504. Moreover it may be noted that in 1404(a) cases the liberal objective of the doctrine will not be materially impaired by requiring personal jurisdiction as a prerequisite to transfer since in 1404(a) cases, unlike 1406(a) cases, venue is an indispensable prerequisite and hence personal jurisdiction except in occasional diversity cases can be easily obtained.

Whether personal jurisdiction is a prerequisite to transfer under 1404(a), is not now before us.

Since the requirements which support venue under § 12 of the Clayton Act and which support amenability to service of process whereby personal jurisdiction may ordinarily be obtained are so nearly the same, the appellant argues that seldom if ever would a plaintiff be privileged to invoke § 1406(a) against a corporate defendant in a private antitrust action if personal jurisdiction were a prerequisite. For in cases in which personal jurisdiction may be acquired by service within the district there would be no defect of venue; it is generally only when the defendant cannot be served within the district that venue would be defective. The appellees counter with the argument that under § 12 of the Clayton Act a defendant, even if not amenable to local service, may be subjected to the jurisdiction by extraterritorial service, so that personal jurisdiction may be obtained even when venue is improper. But if § 12 is available when venue is improper, the only ground upon which the appellees attack the transfer to the court below is gone. For prior to the transfer the appellant did make extraterritorial service on the appellees, as my brothers recognize.[3] The judge below, on the other hand, held that § 12 by its terms was available only in cases in which venue was proper (i.e., cases brought "not only in the judicial district whereof it [the defendant] is an inhabitant, but also in any district wherein it may be found or transacts business"). If this interpretation of § 12 be right, there is weight in the above-stated contention of the appellant that to read into § 1406(a) of the Code a requirement of personal jurisdiction, as in effect the appellees ask us to do, would go far to nullify the liberal objective of § 1406(a): it would then, if I may resort to an Irish bull, be available only when there was no occasion for its use. That interpretation of § 1406(a) I would think neither desirable nor required.

The appellees argue that my construction of § 1406(a) will invite its abuse. But I am not impressed by the pro-

3. See majority opinion, footnote 1.

cedural spectres which they conjure up to bolster this argument.[4] I do not suggest that a transfer by a court without personal jurisdiction will "cure" the jurisdictional defect; the defendants would still have to be properly served before their substantive rights could be affected. And in any event, if a plaintiff attempts to make improper use of the Act the court, "in the interests of justice," may refuse to order the transfer.

Certainly in this case no improper tactics seem to be present. The plaintiff for aught that appears had some reason for laying venue in Pennsylvania, its home state. After a substantial controversy it prevailed as to some defendants and failed as to others, including these appellees. Doubtless in bringing suits against all in Pennsylvania it was actuated by the hope of prosecuting its claim against all the defendants in one action in its home forum. There was nothing improper in that: indeed, the law frowns upon needless severance of trials and provides some flexibility to accommodate the convenience of litigants. Doubtless plaintiff was also actuated by a desire to hold the filing date of its complaint as marking the period for which damages would be recoverable: if compelled to serve the appellees anew in New York it would lose the right to recover for damages which had accrued in the earlier part of the statutory period under its original complaints. But this consideration, also, was completely consistent with its good faith: indeed, at least in the circumstances of this case, that factor might be considered as one in the interest of justice tending to support the transfer. *Per contra*, it would not have been a wise use of discretion to withhold the transfer merely to provide the appellees with immunity for part of the statutory period.

I think that considerations of procedural policy unite with the weight of precedent in support of the construction I have put on the Act. The only court of appeals de-

4. If there were substance to such spectres one would expect the appellees to refer to actual cases instead of to hypothetical cases only.

cision which supports my brothers is *Hohensee v. News Syndicate*, referred to in footnote 10 of the majority opinion. With deference, I can only say that that case, like the opinion of my brothers herein, wholly without Congressional sanction reads into § 1406 a restriction on a salutary procedural provision which is not there. And a careful reading of its Congressional history does not suggest to me that such a restriction was intended. I would hold that the transfer was made not only legally but also in a wise exercise of discretion.

APPENDIX B.

OPINION OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT.

KRAFT, *J.* December 22, 1958

Plaintiff commenced these two actions against substantially the same defendants under relevant provisions of the antitrust laws. The first action (21506) was commenced on October 17, 1956 and the second (22092) on February 18, 1957. The actions are essentially identical except that the second (a) added certain defendants, (b) sued several original defendants in additional capacities and (c) extended the period for which damages are sought. Now pending are numerous pre-trial motions which will be disposed of seriatim.

I. MOTIONS TO DISMISS FOR IMPROPER VENUE.

These motions were filed by all defendants in both actions except Barrymore Theatre Corporation (Barrymore) and Modern Theatre Corporation (Modern).[1] Disposition of these motions requires some analysis of the facts germane to two classes of defendants, i.e., individuals and corporations.

(a) INDIVIDUAL DEFENDANTS.

After granting a cause of action under the antitrust laws to anyone injured in his business or property, 15 U. S. C. A. § 15 lays the venue in such actions in ". . . any district court of the United States in the district in which the defendant resides or is found or has an agent, . . ." We reject defendants' contention that 28 U. S. C. A. § 1391(b), a general venue statute, applies. By its express

1. Modern and Barrymore are not defendants in 21506. Both filed answers in 22092.

terms § 1391(b) does not apply where a different law provides otherwise.[2]

Lawrence Shubert Lawrence (Lawrence) resided in this district and was properly sued here.

Plaintiff does not contest the averments in the remaining individual defendants' affidavits that each resided in New York and, since none of them was *found* here, we must determine whether any of them had *an agent* here.

Prior to 1914, venue in antitrust actions was laid in the district in which the defendant resided or was found.[3] The addition of the district in which defendant "has an agent" was a change made by the Clayton Act, which also enlarged prior venue provisions as to corporations by adding thereto the district in which a corporation transacts business.[4] In *Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 U. S. 359 (1927), the court construed the latter addition as one intended to broaden the concept of "found" in the earlier venue provisions. A corporation could thus be held to be transacting business, and venue established, "—although not present by its agents carrying on business of such character and in such manner that it is 'found' therein and is amenable to local process,—if in fact, in the ordinary and usual sense, it 'transacts business' therein of any substantial character."[5] To meet the test of "found" in the earlier venue provisions, *People's Tobacco Co., Ltd., v. American Tobacco Co.*, 246 U. S. 79, 84, 86 (1918) required the presence of agents carrying on business as described above.

---

2. See Fourco Glass Co. v. Transmirra Products Corp., 353 U. S. 222, 228 (1957); Anderson-Friberg, Inc. v. Justin R. Clary & Son, Inc., 98 F. Supp. 75, 83 (S. D. N. Y. 1951); Lipp v. National Screen Service Corp., 95 F. Supp. 66, 70 (E. D. Pa. 1950).

3. Act of July 2, 1890, c. 647.

4. 15 U. S. C. A. § 22.

5. 273 U. S. at p. 373. See also, United States v. Scophony Corporation of America, 333 U. S. 795, 807 (1948) which reaffirmed this construction.

We believe "or has an agent" broadened the concept of "found" in the case of individual defendants, just as "transacts business" broadened the concept of "found" in the case of corporate defendants, although *Eastman* did not decide this question. The purpose of these two changes was to ". . . give the plaintiff the right to bring suit and have it tried in the district where the defendant had committed violations of the Act and inflicted the forbidden injuries."[6] The difference in the choice of words applicable to individual and corporate defendants was intended to avoid too broad a change which might have jeopardized passage of the entire bill.[7]

> "Thus, *strict* uniformity in the two sections' venue provisions was not achieved. But whatever their differences may be, *each addition was designed to aid plaintiffs by giving them a wider choice of venues, and thereby to secure a more effective, because more convenient,* enforcement of antitrust prohibitions."[8] (Emphasis supplied.)

From the affidavits filed by the parties it appears that both J. J. Shubert and John Shubert had the unquestioned right and power to control Lawrence and that each repeatedly exercised such right and power in directing Lawrence's business activities in this district. The extent of J. J. Shubert's exercise of control over Lawrence is somewhat surprising, in view of the latter's high position in the Shubert enterprises. J. J. Shubert ratified the orders of Lawrence for repairs to local theatres, authorized his vacations, negotiated contracts with local unions, arranged schedules for the lengths of runs in local theatres, and, in some instances, even personally inspected local theatres.[9]

---

6. United States v. National City Lines, Inc., 334 U. S. 573, 583 (1948).

7. Id. at p. 585.

8 Id. at p. 586.

9. See exhibits 155 to 180 accompanying plaintiff's affidavit.

John Shubert, a defendant in 22092, exercised a like degree of control over Lawrence in the operation of local theatres. He instructed Lawrence on the changes to be made in contracts, on the changes of performances from one Philadelphia theatre to another, on the orders for tickets for performances, on increases and decreases in ticket prices, on price scales, advertising, and on other matters. It is difficult to conceive of a more scrupulous control than that exercised both by J. J. and by John Shubert over Lawrence in the business conduct of the local theatres. We find, therefore, that, as the term is defined at common law and under the more liberal intendment of antitrust cases, Lawrence was the agent of both Shuberts within the meaning of 15 U. S. C. A. § 15.[10] See *Riss & Company, Inc. v. The Association of Western Railways*, 159 F. Supp. 288, 293 (D. C. D. C. 1958).

The evidence does not persuade us, however, that any other of the moving individual defendants had an agent within this district.

Accordingly, the motions of Lawrence and J. J. Shubert in 21506 and 22092 and of John Shubert in 22092 will be denied. The motions of Milton Shubert, William Klein, Sylvia W. Golde and Marcus Heinman, individually, in each action, will be granted.

(b) Corporate Defendants.

United Booking Office, Inc. (U. B. O.), Select Theatres Corporation (Select Theatre), Select Operating Corporation (Select Operating), and L. A. B. Amusement Corporation (L. A. B.) are defendants in both actions. Barrymore Theatre Corporation (Barrymore) and Modern Theatre

---

10. It may be noted, parenthetically, that the fact that J. J. and John Shubert may have been acting in their respective capacities as corporate officers does not mean that, for venue purposes, they had no agents here as individuals. See, United States ex rel. Marcus v. Hess, 41 F. Supp. 197, 211 (W. D. Pa. 1941). See also, 15 U. S. C. A. § 24.

Corporation (Modern) are defendants only in 22092. There are no motions before us by Barrymore or Modern or by L. A. B. which appears to have been dissolved on June 19, 1952. We have for consideration the motions of U. B. O., Select Theatre and Select Operating.

From the affidavits and accompanying exhibits filed by the parties it is evident that the material facts affecting the internal organization, the inter-corporate functions and dealings of the corporations are not matters of substantial dispute. It is upon the legal significance of those facts that disagreement exists. The complicated nature of the arrangements among these corporations necessitates a somewhat detailed discussion of the relevant facts.

Select Theatre was the parent corporation. All of its preferred and 90% of its common stock was owned by various members of the Shubert family. Select Theatre was the owner of all of the stock of Select Operating, Barrymore and Modern and was the owner of 50% of the stock of U. B. O., the other 50% of which was owned by Marcus Heiman, President of U. B. O.

The two wholly-owned local subsidiaries, Barrymore and Modern, ostensibly operated the Philadelphia theatres and were the only corporate defendants licensed to do business in Pennsylvania. Purportedly, Barrymore operated the Forrest Theatre and Modern the Walnut, Locust and Shubert Theatres. All the corporate defendants, except Modern, a Pennsylvania corporation, were incorporated in New York and had their offices there in the same building. U. B. O., Select Theatre and Select Operating were not licensed to do business in Pennsylvania and had no address, telephone listing or officers resident in that state.

Corporate separateness in accounting procedures was observed in the actual day to day operation of these enterprises. The treasurer of each Philadelphia theatre collected the receipts, deducted the local amusement tax and remitted the amount of the tax to Select Operating, which kept the books of all the corporations. Select Operating

deposited the tax remittance in a special account in New York to the sender's credit and issued its own check to the taxing authority for the respective account of Barrymore or Modern. The tax returns for the local corporations were prepared by Select Operating and forwarded with the remittances.

Each week the manager of each local theatre deposited the balance of the weekly receipts in a Philadelphia bank and issued a check to Select Operating for that amount. Customary payroll deductions, etc., were computed in Philadelphia and a check for such deductions was likewise issued to Select Operating. These were accumulated in New York and appropriate returns were prepared and payments made by Select Operating for Modern and Barrymore.

Defendant Lawrence was the general manager of the Philadelphia theatres and was ostensibly employed by Barrymore and Modern. Each of these corporations sent its proportionate share of Lawrence's salary to Select Operating in New York and the latter issued its own check in payment of his salary. Both Barrymore and Modern contributed to the operational cost of Select Operating and also paid it a "home office fee" for "executive and management services".

Shows were booked in New York through the services of Select Operating or U. B. O. This entailed agreements for the use by producers of designated theatres on specific dates. The terms of each booking agreement were embodied in a written contract signed by the producer and either Barrymore or Modern as the case might be. Either J. J. Shubert or John Shubert executed the contract as an officer of Barrymore or Modern.

Select Operating also executed blanket contracts for concessions in all four Philadelphia theatres and the amounts received therefrom were apportioned on its books between the corporate operators of the local theatres.

The foregoing facts which appear in defendants' affidavits indicate clearly that in accounting procedures, at

least, corporate separateness was carefully observed. In the exhibits accompanying plaintiff's affidavit, however, are strong indications that, in other respects, corporate separateness was not so meticulously adhered to.

Excerpts from the minute books of Select Theatre show that the corporate existence of Barrymore and Modern was largely discretionary with the parent. Correspondence between Select Theatre and Philadelphia, signed by J. J. Shubert and others on Select Theatre stationery, evidences a close control by Select Theatre of the minutiae of day to day operating procedures. The insurer of the local theatres addressed all correspondence to Select Theatre. Documents relating to the opening of a local bank account by a subsidiary were sent to Philadelphia by Select Theatre. Office materials such as stationery, ticket envelopes, etc., for Barrymore and Modern were supplied by Select Theatre. The advertising of the four local theatres was consolidated. Each theatre used its facilities to advertise plays presented at the others.

Select Theatre sent to Philadelphia "termination of contract notices" to be signed by local employees. J. J. Shubert for Select Theatre was kept carefully advised of the status of contracts with musicians in Philadelphia and other cities. Select Theatre instructed local managers about obtaining discounts for advertising in Philadelphia papers, about excessive expenditures for telephone calls and requested weekly reports on the operation of the local theatres.

Although bookkeeping seems to have been the major function of Select Operating, it was also the center from which supplies were sent to the Philadelphia theatres. Employment records and copies of contracts for shows were also kept by Select Operating.

U. B. O. booked shows for the Philadelphia theatres and determined the booking dates. It negotiated the terms of the contracts with the producers. Inquiries by private parties about the use of the Philadelphia theatres were referred to U. B. O.

In the case of corporations the test for venue under the antitrust law is, as we have said, whether the corporation is an inhabitant of, is found in or transacts business in the district in which suit is brought.

None of the three moving corporate defendants was an inhabitant of this district. The tests which determine whether a corporation is "found" within the district are narrower in scope than those which determine whether it "transacts business" therein. We shall, therefore, determine whether any of the moving corporate defendants transacted business in this district."[11]

We decline to adopt the plaintiff's theory that the allegation of conspiracy in the complaint constitutes Barrymore or Modern or both, as alleged co-conspirators, the agent or agents of the movant corporate defendants for venue purposes under the Clayton Act in any district where Barrymore or Modern is amenable to suit. Several cases have so held,[12] in purported reliance on *Giusti v. Pyrotechnic Industries, Inc.*, 156 F. 2d 351 (9th Cir. 1946), but we incline to the reasoning in two recent cases which conclude that it is doubtful that *Giusti* so held or that this is the law in any circuit."[13]

It is next urged that venue can be laid in this district on the ground that Select Theatre, Select Operating and U. B. O. were themselves transacting business here or were doing so through the agency of Barrymore and/or Modern, the wholly-owned subsidiaries of Select Theatre. The evi-

---

11. Eastman Kodak Co. of New York v. Southern Photo Materials Co., 273 U. S. 359 (1927).

12. Bliss & Company, Inc. v. The Association of Western Railways, 139 F. Supp. 288, 295, 296 (D. C. D. C. 1956); De Golia v. Twentieth Century-Fox Film Corp., 140 F. Supp. 316 (N. D. Cal. 1953); Ross-Hart Port Theatre, Inc. v. Eagle Lion Films, Inc., 140 F. Supp. 401 (E. D. Va. 1954); Don George, Inc. v. Paramount Pictures, Inc., 111 F. Supp. 458 (W. D. La. 1951).

13. Bertha Building Corp. v. National Theatres Corp., 248 F. 2d 833, 836 (2d Cir. 1957); Independent Productions Corp. v. Loew's, Inc., 148 F. Supp. 460 (S. D. N. Y. 1957). See also, Hansen Packing Co. v. Armour & Co., 16 F. Supp. 784 (S. D. N. Y. 1936).

dence fails to persuade us that these corporations were themselves doing business here. We consider, then, whether the transaction of business here by Barrymore and Modern is sufficient, under the circumstances, to warrant holding that their parent, Select Theatre, did so.

We are mindful that the Supreme Court has held that, as long as corporate separateness is strictly maintained, service of process on a wholly-owned subsidiary does not subject the parent corporation to the court's jurisdiction, even though the purpose of incorporating the subsidiary was to avoid subjection of the parent to such jurisdiction. *Cannon Manufacturing Co. v. Cudahy Packing Co.*, 267 U. S. 333 (1925). We are also aware that in several anti-trust cases the standard of *Cannon* has been adopted in determining questions of venue. However, *Cannon* itself deemed the rule inapplicable where *an affirmative ground is shown for treating the subsidiary as an agent of the parent*, and antitrust cases have recognized the limitation.[14]

In the present case an affirmative ground has been shown, we think, for treating Barrymore and Modern as local agents of their parent, Select Theatre, for the same reasons which impel us to hold Lawrence, individually, to be an agent of J. J. and John Shubert. The Shuberts, in their right and power to control Lawrence, as well as in their exercise of that right and power, were acting both as corporate officers and as individuals and, on many occasions, in such fashion as to make inseparable the capacity in which, respectively, they acted. Thus, as officers of the parent corporation, they had the right and power to and did control the acts of Lawrence, as an executive employee of the two local subsidiaries.

In *Waldron v. British Petroleum Co., Ltd.*, 140 F. Supp. 830 (S. D. N. Y. 1957), a case remarkably similar to this, the court held a foreign parent to be transacting business in the forum by reason of the activities of its wholly-owned

14. United States v. The Watchmakers of Switzerland Information Center, Inc., 133 F. Supp. 40, 45 (S. D. N. Y. 1955).

subsidiaries there. In that case a foreign corporation maintained two wholly-owned subsidiaries in the Southern District of New York, at least one of which attempted to preserve technical separateness from its parent. The court, noting the active interrelation between parent and subsidiary in other respects, held as we have indicated. Certain language in the court's opinion in that case appears particularly apropos here and we quote it *in extenso:*

> "A person would have to be blind to the economic facts of business life if he did not recognize that the activities of [the subsidiaries] in this District are activities which in another less elaborate corporate set-up would be conducted directly by branch offices or agents within the District. It is Socal, and not the subsidiaries, which is the defendant in the present action. What is Socal? It is a large aggregation of invested capital which transacts its business through officers, agents, employees, and through subsidiaries, which in the drilling, production and marketing of oil operate as agents, employees or branch offices would operate. *Does the fact that this large business entity, for tax reasons or otherwise, decides to fragmentize its operations into numerous corporate subsidiaries, make the resulting operations of the subsidiaries any the less a part of transaction of business by Socal?*" (p. 834) (Emphasis supplied).
>
> * * *
>
> "A corporation may be a fiction of the law but there is no reason to carry the fiction to the extreme of saying that a corporation which has wholly owned subsidiaries performing services in the local jurisdiction which ordinarily would be performed by service employees, or making sales which ordinarily would be made by a sales department, is in fact not transacting business in that jurisdiction, *particularly when the entire corporate set-up of the defendant shows that it is designed to operate to a substantial degree through*

separate corporate entities responding to the wishes and directions of the parent and providing the revenues sought by the parent. We would be exalting fiction over fact if we were to conclude that under those circumstances the parent company was not in fact transacting business in this District through the instrumentality of its wholly owned subsidiaries." (p. 835) (Emphasis supplied).

The applicability of this language to the facts before us is clear. Lawrence, through Barrymore and Modern, conducted the actual operations, but only subject to the controlling directions of Select Theatre, acting through the Shuberts. Cf. *United States v. The Watchmakers of Switzerland Information Center, Inc.*, 134 F. Supp. 710, 712 (S. D. N. Y. 1955).

We consider, next, whether the transaction of business here by Barrymore and Modern is sufficient, under the circumstances, to warrant holding that Select Operating or U. B. O. did so.

Select Operating owned no stock of Barrymore or Modern. All of Select Operating's stock was owned by Select Theatre. Select Operating cannot be held to have transacted business here by reason of the activities of its wholly-owned subsidiaries because Barrymore and Modern were wholly-owned subsidiaries of Select Theatre, not of Select Operating.

The evidence persuades us that the principal function of Select Operating was to provide a central bookkeeping system and service department for the enterprises which Select Theatre owned or controlled, among them Barrymore and Modern. Select Theatre was the principal and Select Operating its agent. Neither Barrymore nor Modern was agent for Select Operating; to the contrary, Select Operating was, for certain purposes, their agent under the control and direction of their common principal, Select Theatre. The business transacted here by Barrymore and Modern

was under the control and direction and for the benefit of Select Theatre, not Select Operating.

U. B. O. owned no stock of Barrymore or Modern. Half of U. B. O.'s stock was owned by Select Theatre and half by Marcus Heiman. U. B. O. cannot be held to have transacted business here by reason of the activities of its wholly-owned subsidiaries because Barrymore and Modern were wholly owned subsidiaries of Select Theatre, not of U. B. O.

The evidence persuades us that the principal function of U. B. O. was to serve as an intermediary and clearing house between theatrical producers and theatre owners including, but not limited to, Select Theatre and its subsidiaries. Select Theatre was one of the principals for which U. B. O. functioned as broker or agent. Neither Barrymore nor Modern was agent for U. B. O.; to the contrary, U. B. O. was, for booking purposes, their broker or agent under the control and direction of Select Theatre. The business which Barrymore and Modern transacted here was under the control and direction and for the benefit of Select Theatre, not U. B. O. The latter's apparent power to fix price scales for Barrymore and Modern was a power in fact exercised by Select Theatre through John Shubert, though on U. B. O. sationery, and was not a power possessed by U. B. O.

Defendants place great reliance upon *Pfeiffer v. United Booking Office, Inc.*, 93 F. Supp. 363 (N. D. Ill. 1950) in which the court granted a motion to dismiss made by the same three defendants upon the same grounds which they here advance. However, we think that *Pfeiffer* is, in part, distinguishable from the present case principally because the interrelations between parent and subsidiaries are more fully revealed here than there.

As to Select Theatre, which owned all the stock of the local Chicago corporation, that court found that the separation between parent and subsidiary was "real". The conclusion was that correspondence between named employees of Select Theatre and the Chicago manager did not show that Select Theatre had any authority over the local man-

ager. As indicated by what we have said heretofore, such a conclusion could not be fairly drawn here from the correspondence between J. J. Shubert and Lawrence.

It is of interest to note that in *Waldron*, supra, there was a like claim by the parent that *two* prior cases against the same defendants had been decided favorably to the parent corporation upon its motions to dismiss for lack of venue. The court, in *Waldron*, pointed out that the *Scophony* ruling was made after the decisions in those cases and stated: "It is doubtful if a court today, guided as it must be by these later opinions of the United States Supreme Court, could reach the same conclusion as Judge Bright did in the Universal Oil Products case" (pp. 835, 836). The latter case, referred to by the court in *Waldron*, was *Winkler-Koch Engineering Co. v. Universal Oil Products Co.*, 70 F. Supp. 77 (S. D. N. Y. 1946), which was the only case relied on by *Pfeiffer*.

The motion of Select Theatre will, therefore, be denied and the motions of Select Operating and U. B. O. will be granted.

II. Motions to Quash Service and Dismiss the Action for Lack of Jurisdiction Over the Person.

A. Fiduciary Defendants.

These motions have been filed, inter alia, on behalf of the fiduciary defendants in both actions, i.e., Lawrence, Milton Shubert, William Klein and Sylvia W. Golde as *trustees* of the estate of Lee Shubert, deceased. The basis of the motions is that the fiduciaries act under the authority of the state of New York, are not amenable to and have not consented to suit in this district.

The unimpeached affidavits of these fiduciary defendants establish that they have not been designated or qualified as fiduciaries in any state other than New York; that they have not consented to suit in any other state; that they

have not received or administered any assets of the estate; that the trusts of which they are trustees have not been established; that they have not, as trustees, engaged in or transacted any business in Pennsylvania; that no assets of the estate are within this district; that there is no office of the estate within this district.

Lacking any affirmative statement or brief on this subject from the plaintiff, our independent investigation fails to reveal any ground upon which jurisdiction over these fiduciaries can be sustained. Under F. R. Civ. P. 17(b) the capacity of an individual acting in a representative capacity to be sued is determined by the law of the state in which the district court is held. If these fiduciaries lack capacity to be sued in Pennsylvania this court is without jurisdiction.

The general rule at common law is that a foreign personal representative may not be sued on a claim against the decedent's estate in a jurisdiction other than that of his appointment. Although Pennsylvania would appear at first glance to differ, we believe that close analysis of the cases supports the conclusion that, despite an apparent difference, a foreign representative may be sued in Pennsylvania only if there are assets of the estate present there.

In the leading case of *Laughlin & McManus v. Solomon*, 180 Pa. 177 (1897) a Delaware executor was served in Pennsylvania in an action upon a note. The trial court sustained the defendant's demurrer to the complaint and the Supreme Court reversed. Plaintiff-appellant contended that it could not be assumed in the pleading stage that the executor had no assets of the estate within the state and that evidence might establish the presence of assets within the state when the decedent died or the presence of assets thereafter brought into the state by the executor, in either of which instances the action was maintainable. In apparent acceptance of plaintiff's argument the court distinguished *Magraw v. Irwin*, 87 Pa. 139 (1878) and declared that case to be in harmony with Pennsylvania law. In *Magraw* the only assets of the estate ever within Pennsylvania were with-

drawn by the executrix after they had been awarded to her as legatee. After her death a foreign administrator c.t.a. was appointed and, having entered the state, was sued. The court held that the succeeding administrator could not be charged in Pennsylvania with assets which had been administered and distributed and that no jurisdiction over the fiduciary was acquired. Of *Magraw* the Laughlin case said (p. 183):

> "The decision therefore goes no further than the principle . . ., that an administrator is not chargeable with assets in another state which have never been within his control. . . ."

In the present case the only available evidence is that the fiduciaries have no assets here and are not present in a fiduciary capacity. See, *Independent Productions Corp. v. Loew's, Inc.*, 148 F. Supp. 460, 462 (S. D. N. Y. 1957).

In *Laughlin* there was no evidence of the presence or absence of assets. In *Magraw*, it was established upon trial that there were no assets within the jurisdiction. We conclude then that, under Pennsylvania law, where it affirmatively appears that no assets of a foreign estate are present in the forum no jurisdiction is acquired over the foreign representatives of the estate. This Circuit has interpreted the *Laughlin* case as authorizing local suits against foreign representatives only ". . . where claims to property within the jurisdiction of the court are involved." *Callwood v. The Virgin Islands National Bank*, 221 F. 2d 770, 778 (3rd Cir. 1955).

The motions of the fiduciary defendants will accordingly be granted.

B. Individual and Corporate Defendants.

We consider next the motions of J. J. Shubert, John Shubert and Select Theatre as to whom we have concluded venue was proper.

15 U. S. C. A. § 22, after laying the venue against corporations in antitrust actions provides that ". . . all

process in such cases may be served in the district of which it [the corporation] is an inhabitant or wherever it may be found." Once venue is properly established it appears that a defendant corporation may be served at either place designated by the statute, even though those places are outside the district in which suit has been brought.[15]

Extra-territorial service upon Select Theatre in each action was by alias summons in New York where that defendant admittedly had its principal office. This service was proper.[16]

By the provisions of F. R. Civ. P. 4(d)(7) service upon J. J. Shubert and John Shubert was authorized ". . . in the manner prescribed . . . by the law of the state in which the service is made for the service of summons or other like process upon any such defendant in an action brought in the courts of general jurisdiction of that state." In Pennsylvania, Pa. R. Civ. P. 1009(b)(2)(iii) authorizes service upon individuals by handing a copy of the summons or complaint "at any office or usual place of business of the defendant to his agent or to the person for the time being in charge thereof."

In 21506 J. J. Shubert was purportedly served by leaving a copy of the summons and complaint at 209 Quince Street, Philadelphia "on the desk of woman in charge who refused to give her name or title." In 22092 service was purportedly effected by J. J. Shubert and John Shubert by leaving copies of the summons and complaint at the same address with "Mrs. C. E. Richman woman in charge of

---

15. Eastman Kodak Co. of New York v. Southern Photo Materials Co., 273 U. S. 359, 373 (1927); Pfeiffer v. United Booking Office, 93 F. Supp. 363, 364-65 (N. D. Ill. 1950); Sure-Fit Products Co. v. Fry Products, Inc., 23 F. Supp. 610, 612 (S. D. N. Y. 1938); Katz Drug Co. v. W. A. Sheaffer Pen Co., 6 F. Supp. 210, 212 (W. D. Mo. 1932).

16. Waldron v. British Petroleum Co., Ltd., 149 F. Supp. 830, 836 (S. D. N. Y. 1957) upheld a similar service in a similar situation. In each action an alias summons was served on Select Theatre by leaving a copy of the complaint and summons with J. J. Shubert, its president, at the corporate office, 236 W. 44th St., New York City.

Forrest Theatre place of business designated by plaintiff's attorney for service on defendant."

From the affidavits filed by counsel it appears unchallenged that 209 Quince Street is the local office or usual place of business of Barrymore and Modern and that both J. J. Shubert and John Shubert are officers of these corporations.

The rule in this district following the Pennsylvania law, is that the Marshal's return is conclusive and cannot be attacked as false in fact,[17] so that we accept as a fact that the person to whom the copies of the summons and complaint were handed was for the time being in charge of the office at 209 Quince Street.

In *Wylie v. McKnight*, 10 Beaver C. L. J. 145, 153 (Pa. Comm. Pl. 1948) service upon individual defendants by leaving copies of the complaint at the office of a corporation of which they were officers and directors was sustained despite the fact that the defendants lived and transacted their business in a different county.[18] Upon the authority of *Wylie*, and in view of the fact that the purpose of service is to insure that a defendant will receive actual knowledge of the commencement of the action against him, we conclude that the manner of service upon the two individual defendants was proper.

The motions of Select Theatre and J. J. Shubert in each action will be denied and the motion of John Shubert in 22092 will be denied.

III. Motions for Summary Judgment.

Civil Action 22092 was commenced on February 18, 1957. In that action the defendants Barrymore, Modern

---

17. Woods v. Zellers, 9 F. R. D. 6 (E. D. Pa. 1949). *Accord:* Hicklin v. Edwards, 226 F. 2d 410 (8th Cir. 1955). *Contra:* Metropolitan Theatre Co. v. Warner Bros. Pictures, 16 F. R. D. 391 (S. D. N. Y. 1954); Puett Electrical Starting Gate Corp. v. Thistle Down Co., 2 F. R. D. 550 (N. D. Ohio 1942).

18. See also, Messing v. Messing, 84 D. & C. 367, 375 (Pa. Comm. Pl. 1952).

and Lawrence have moved for summary judgment under F. R. Civ. P. 56 on the ground that any cause of action arising prior to February 18, 1953 is barred by the applicable statute of limitations, 15 U. S. C. A. § 15(b) (Supp. 1957). Plaintiff contends, however, that the statute of limitations was tolled as to the moving parties by reason of 15 U. S. C. A. § 16(b) (Supp. 1957) because an antitrust action, which terminated in a consent judgment, was commenced against the Shubert interests on February 21, 1950.

The motions of Barrymore, Modern and Lawrence in 22092 will be denied without prejudice to their rights to assert the statute of limitations as a defense, in whole or in part, in their responsive pleadings.

IV. Plaintiff's Motion for Leave to File an Amended Complaint.

Plaintiff has filed this motion in 21506 for the sole purpose of extending to September 1, 1950 the period during which the acts in the original complaint are alleged to have occurred. In other respects the amended complaint is essentially identical with the original and, in its proposed form, is substantially identical with the complaint in 22092.

The defendants in 21506, other than Lawrence, have not filed or served responsive pleadings and, as to them, the plaintiff may amend its complaint as of course. That a responsive pleading was served by one defendant, Lawrence does not alter this result.[19]

Leave to amend the complaint against Lawrence will be granted without prejudice to his right to assert in his responsive pleading the defenses raised in his motion for summary judgment.

---

19. F. R. Civ. P. 15(a); see Ginsburg v. Stern, 19 F. R. D. 238, 241 (W. D. Pa. 1956) *order aff'd in part*, 242 F. 2d 379 (3rd Cir. 1957); cert. denied, 26 L. W. 3298; Peckham v. Scanlon, 241 F. 2d 761, 764 (7th Cir. 1957); Simmons v. Cantor, 3 F. R. D. 197 (W. D. Pa. 1943); Pallant v. Sinatra, 8 Fed. Rules Serv. 15a.11, Case 1 (S. D. N. Y. 1945).

V. Motions to Vacate Ex Parte Order Permitting Joinder of Third Party Defendants and to Discuss the Third Party Complaint.

The essence of the third party complaint in each action is that William Goldman and William Goldman Theatres, Inc., predecessors to plaintiff as lessee of the Erlanger Theatre, conspired with each other to abandon efforts to secure first-run motion pictures for the Erlanger, a function to which that theatre is allegedly better suited. It is alleged that the object of this conspiracy was to afford other theatres operated by William Goldman Theatres, Inc. a competitive advantage over the Erlanger to eliminate it from competition with the other theatres in violation of the antitrust laws. It is further alleged that William Goldman is president and controls the third party corporate defendant.

This complaint states no claim upon which relief can be granted. It has been decided that a corporation may not conspire with itself, i.e., with its officers, agents and employees. *Nelson Radio and Supply Co., Inc. v. Motorola, Inc.*, 200 F. 2d 911, 914 (5th Cir. 1952).[20]

These motions will be granted.

VI. Motions to Strike Paragraphs 9 and 10 From the Complaints.

Each of the remaining defendants has moved in each action to strike from the complaint paragraphs 9 and 10 upon the grounds that they are irrelevant to any injury allegedly incurred by the plaintiff and are scandalous.

---

20. See also, Packaged Programs, Inc. v. Westinghouse Broadcasting Company, Inc., 156 F. Supp. 76, 78 (W. D. Pa. 1957); Central Ice Cream Co. v. Golden Rod Ice Cream Co., 153 F. Supp. 684, 686 (N. D. Ill. 1957); Herren Candy Co. v. The Curtis Candy Co., 153 F. Supp. 751, 755 (N. D. Ga. 1957); Beacon Fruit & Produce Co., Inc. v. H. Harris & Co., Inc., 152 F. Supp. 702, 704 (D. Mass. 1957); Sperry Rand Corp. v. Nassau Research and Development Associates, Inc., 152 F. Supp. 91, 93 (E. D. N. Y. 1957); J. H. Whiteley v. Foremost Dairies, Inc., 151 F. Supp. 914, 923 (W. D. Ark. 1957).

In each complaint these paragraphs allege, in substance, that as a result of defendants' exclusion of the plaintiff from the presentation of theatrical productions, the defendants have conspired with divers persons to restrain the sale of tickets at regular prices at the ticket offices of their respective theatres in order to oblige prospective patrons to buy tickets from brokers and "ticket scalpers" at prices which exceed the established theatre prices; further, that the defendants have thus been enabled to charge and have charged higher prices for tickets than they would otherwise have been able to charge had they not enjoyed a monopoly—all to the detriment of the public and patrons.

In paragraphs 14 and 16 of the complaints plaintiff alleges that it will be unable to obtain legitimate attractions and has suffered specific pecuniary damage. The prayers for relief demand treble damages, injunctions against interference with plaintiff's right to present theatre attractions and against defendants' alleged unlawful refusal to negotiate for such attractions.

The court is authorized by F. R. Civ. P. Rule 12(f) to order stricken from any pleading, upon motion, matter which is redundant, immaterial, impertinent, or scandalous. In *Slick Airways, Inc. v. American Airlines, Inc.*, 15 F. R. D. 175 (1954) Judge Forman aptly expressed the philosophy which this court's experience with antitrust actions leads us to believe should control:

> ". . . pleadings should not be whittled away where the material averred, while not strictly within a rigid interpretation of the rules, is helpful in outlining the background against which the action is laid, particularly where those allegations are factual and will not impose hardship upon the adverse party to answer or otherwise prejudice him. It is equally obvious that . . . the injection of issues remote from the claim of the plaintiff can serve to lead into tributaries away from the main stream of litigation frustrating the pur-

pose to reduce it to its simplest terms and avert unnecessary expenditures of large amounts of time, money and effort, usual concomitants of court controversies even when most expeditiously administered." (pp. 177-178).

For the reasons hereinafter stated we conclude that paragraphs 9 and 10 are remote from and immaterial to the claim of the plaintiff and should be stricken.

Treble damage actions are authorized to be commenced by persons *injured in their business or property* for the damages sustained by them.[21] A complaint in a private civil antitrust action may not allege a violation of the statute and, *ipso facto*, claim damages generally. Specific injury suffered by the plaintiff, differing from that sustained by the plaintiff as a member of the public, must be affirmatively alleged.[22]

The gist of the present complaints is that the defendants conspired to deprive the plaintiff of legitimate theatre attractions with resultant special damage to the plaintiff's business and injury to the public. The plaintiff seeks monetary and injunctive relief. It appears to us that paragraphs 9 and 10 allege a wholly different conspiracy without any affirmative allegation of consequent injury to the plaintiff's business. To the contrary the injury alleged is to the public. If such a conspiracy affecting the public interest does exist the party to take appropriate action under the antitrust laws in the public interest is the Attorney General, not the plaintiff. *Bogle* v. *Thomson*, 138 F. 2d 675 (7th Cir. 1943) precludes the plaintiff's self-appointment as the pub-

21. 15 U. S. C. A. § 15.

22. Bogle v. Thomson, 138 F. 2d 675, 681 (7th Cir. 1943); Revere Camera Co. v. Eastman Kodak Co., 81 F. Supp. 325, 330-331 (N. D. Ill. 1948); Schwartz v. General Electric Co., 107 F. Supp. 58 (S. D. N. Y. 1952); Tivoli Realty, Inc. v. Paramount Pictures, Inc., 80 F. Supp. 899, 905-906 (D. Del. 1948); Caldwell-Clements, Inc. v. McGraw-Hill Publ. Co., Inc., 12 F. R. D. 403, 405 (S. D. N. Y. 1952).

lic's officer to end the alleged ticket selling conspiracy and to punish the alleged conspirators.

In oral argument plaintiff's counsel strongly urged that this conspiracy discouraged people from attending theatres. The complaints contain no such allegation and the contention of counsel is insufficient to show the "manner, nature, character and extent of the injury sustained" by the plaintiff or specific facts upon which damages might be assessed. *Beegle, supra*, p. 881.

The motions to strike will be granted. Counsel will settle and submit orders accordingly.

/s/ C. William Kraft,

J.

ORDER.

(E. D. Pa. No. 21,506)

(Rec. page 647)

Now, the 3rd day of March, 1959, upon consideration of the plaintiff's motion to transfer, conformably to 28 U. S. C. A. § 1406(a), filed January 20, 1959, the court finds it to be in the interest of justice to transfer to the United States District Court for the Southern District of New York this case against the following defendants: Select Operating Corporation, United Booking Office, Inc., Marcus Heiman, Milton Shubert, William Klein and Sylvia W. Golde, as individuals, and such transfer to the United States District Court for the Southern District of New York is now ordered.

It is further ordered that the motions of Milton Shubert, William Klein, Sylvia W. Golde and Marcus Heiman, as individuals, and of Select Operating Corporation and United Booking Office, Inc. to dismiss for improper venue be and are denied.

/s/ C. William Kraft, Jr.,
United States District Judge.

ORDER OF TRANSFER BY THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

Now, the 3rd day of March, 1959, upon consideration of the plaintiff's motion to transfer, conformably to 28 U. S. C. A. § 1406(a), filed January 20, 1959, the court finds it to be in the interest of justice to transfer to the United States District Court for the Southern District of New York this case against the following defendants: Select Operating Corporation, United Booking Office, Inc., Marcus Heiman, Milton Shubert, William Klein and Sylvia W. Golde, as individuals, and such transfer to the United States District Court for the Southern District of New York is now ordered.

It is further ordered that the motions of Milton Shubert, William Klein, Sylvia W. Golde and Marcus Heiman, as individuals, and of Select Operating Corporation and United Booking Office, Inc. to dismiss for improper venue be and are denied.

/s/ C. WILLIAM KRAFT, JR.,
United States District Judge.

APPENDIX C.

OPINION OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

PALMIERI, *J.*

This is an antitrust action originally instituted on October 17, 1956 by plaintiff against various persons and corporations in the Federal District Court for the Eastern District of Pennsylvania. That Court retained the action as to defendants found to be properly before it and, on March 3, 1959, ordered the action transferred to this Court as to the above-named defendants for lack of proper venue in Pennsylvania. Motions filed here by defendants subsequent to transfer will be discussed seriatim.

I.

Motion of Defendants Select Operating Corporation and United Booking Office, Inc. to Dismiss for Lack of Jurisdiction.

Select Operating Corporation and United Booking Office, Inc. are incorporated and have their offices in New York. Plaintiff, claiming the right to extraterritorial process under Section 12 of the Clayton Act, 38 Stat. 736 (1914), 15 U. S. C. § 22 (1958), served these defendants in New York, by alias summons, in February and March of 1957. Defendants immediately moved to quash the returns of service of the summons and to dismiss for lack of jurisdiction and improper venue. In an opinion dated December 22, 1958, 169 F. Supp. 677, the Court in Pennsylvania held that venue was improper, finding that defendants were not inhabitants of or found in Pennsylvania, and did not transact business there as required by Section 12 of the Clayton Act. Transfer was ordered without ruling upon the motions to dismiss for lack of personal jurisdiction.

Service of the alias summons was the only service of process ever received by either defendant in this District. Therefore, the first question presented is whether, under Section 12 of the Clayton Act, the extraterritorial service of process while the action was pending in Pennsylvania had the effect of giving this Court, on transfer, personal jurisdiction over the defendants.

Section 12 provides:

> "Any suit, action, or proceeding under the antitrust laws against a corporation may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business; and all process in such cases may be served in the district of which it is an inhabitant, or wherever it may be found."

If the service purported to be made under this section was effective to give the Court in Pennsylvania personal jurisdiction, such jurisdiction would continue after transfer. See Sen. Rep. No. 303, 81st Cong., 1st Sess., U. S. Code Cong. Serv. 1253 (1949). In order to sustain jurisdiction in Pennsylvania, however, the clause of Section 12 dealing with process would have to be read as wholly independent of the clause dealing with venue. If so read, the extraterritorial service would give the Court in Pennsylvania jurisdiction; the only defect would be improper venue. *Petroleum Financial Corp. v. Stone*, 116 F. Supp. 426, 428 (S. D. N. Y. 1953) (dictum), Note, 38 Minn. L. Rev. 874 (1954).

The language of the section itself precludes the interpretation set forth above. By the phrase "all process in *such cases*" (emphasis supplied), the privilege of extraterritorial service is expressly confined to actions brought in a district in which the corporation is an inhabitant, found, or transacting business. *Dazian's Inc. v. Switzer Bros.*, 111 F. Supp. 648 (N. D. Ohio 1951); *Midwest Fur Producers Ass'n v. Mutation Mink Breeders Ass'n*, 102 F. Supp. 649 (D. Minn. 1951); *Reid v. University of Minnesota*, 107 F.

Supp. 439 (N. D. Ohio 1952); *cf. Greenberg v. Giannini*, 140 F. 2d 550 (2d Cir. 1944); *Lavin v. Lavin*, 182 F. 2d 870, 873 (2d Cir. 1950) (dictum). That the Pennsylvania forum is not such a District is no longer in dispute. Therefore plaintiff cannot invoke Section 12 of the Clayton Act to legitimatize the extraterritorial service. The Court in Pennsylvania never acquired personal jurisdiction over the defendants, and this Court did not acquire personal jurisdiction as a result of the transfer.

Nor was personal jurisdiction obtained in this District by virtue of the fact that the alias summons was delivered in New York. Service made without statutory authority is of no effect regardless of actual notice to defendants. *Cf. Wuchter v. Pizzuti*, 276 U. S. 13 (1928).

This Court now lacks personal jurisdiction over the defendants since effective service of process has never been accomplished. However, if the transfer to this District were authorized, plaintiff might still be in a position to avoid dismissal by making proper service upon defendants without further delay. See *UNRRA v. The Mormadpine*, 99 F. Supp. 552 (S. D. N. Y. 1951); 5 Moore, Federal Practice § 41.11 at p. 1039 (2d ed. 1951). Therefore, the second question to be determined on this motion is whether a Court, lacking jurisdiction over defendants, may nonetheless transfer the action to a District where service can be effected.

This issue, requiring interpretation of the transfer provisions of the Judicial Code, 28 U. S. C. §§ 1404(a), 1406(a) (1952), is one on which the Courts are in disagreement. *Independent Productions Corp. v. Loew's, Inc.*, 148 F. Supp. 460 (S. D. N. Y. 1957); *McDaniel v. Drotman*, 103 F. Supp. 643 (W. D. Ky. 1952); *Wilson v. Kansas City So. Ry.*, 101 F. Supp. 56 (W. D. Mo. 1951); *Fistel v. Beaver Trust Co.*, 94 F. Supp. 974 (S. D. N. Y. 1950) (transfer may be made only by a court which has personal jurisdiction). *International-Rotterdam, Inc. v. Thomsen*, 218 F. 2d 514 (4th Cir.), 68 Harv. L. Rev. 1069 (1955) (admiralty); *Orzulak v. Federal Commerce and Navigation Co.*, 168 F. Supp. 15 (E. D.

Pa. 1958) (admiralty); *United States v. Welch*, 151 F. Supp. 899 (S. D. N. Y. 1957); *Petroleum Financial Corp. v. Stone*, 116 F. Supp. 426 (S. D. N. Y. 1953); *Lumbermens Mut. Cas. Co. v. Mohr*, 87 F. Supp. 727 (S. D. Texas 1949) (transfer may be made by a court which lacks personal jurisdiction). Section 1406(a), authorizing transfer when venue is improperly laid, provides:

> "The district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought."

Section 1404(a), since it applies when venue is proper but the forum in which the action is brought is inconvenient, is not directly involved in this action. It is appropriate to note, however, that the Courts have not drawn a distinction between the two sections in regard to the propriety of transfer by a Court which lacks jurisdiction. *E.g., Petroleum Financial Corp. v. Stone, supra*; 42 Geo. L. J. 315, 318 (1954).

This Court is of the view that Section 1406(a), which by its terms speaks to defective venue only, cannot be made to do service when there is also a jurisdictional defect. Proper jurisdiction is the more basic requirement. See *Neirbo Co. v. Bethlehem Shipbuilding Corp.*, 308 U. S. 165, 167-168 (1939). The drafters of the Judicial Code made an express provision for transfer in the event of improper venue. They made no express provision for transfer in the event of lack of jurisdiction. It is unlikely that the drafters relied upon a venue section to carry along an implicit provision for transfer to cure a jurisdictional defect. See Sen. Rep. No. 303, 81st Cong., 1st Sess., U. S. Code Cong. Serv. 1253 (1949); Notes 38 Minn. L. Rev. 874, 23 U. Cinn. L. Rev. 357, 359 (1954).

It should be noted that *Schiller v. Mit-Clip Co.*, 180 F. 2d 654 (2d Cir. 1950), which has been cited as authority for the propriety of transfer when jurisdiction *in personam*

could not be had in the transferor forum, *United States v. Welch*, 151 F. Supp. 899 (S. D. N. Y. 1957); *Petroleum Financial Corp. v. Stone, supra;* 68 Harv. L. Rev. 1069, 1070 (1955), never reached the question. In that case plaintiff resisted and defendant argued in support of transfer. The Court of Appeals, in denying plaintiff's petition for a mandamus to compel the district judge to revoke the transfer order, stated: ". . . [T]he plaintiff cannot complain because he has not suffered the dismissal which he so richly deserved. . . . Whether we should have any jurisdiction, either by appeal or by mandamus, to review such an order, we need not decide." 180 F. 2d at 655.

On the reasoning set forth above it is concluded that the Court in Pennsylvania improperly transferred the action as to defendants Select Operating Corporation and United Booking Office, Inc. to this Court. Since there is nothing to support the pendency of the action here, it must be dismissed. *E.g., Wilson v. Kansas City So. Ry.*, 101 F. Supp. 56 (W. D. Mo. 1951). The alternative, remand to the transferor district, would serve no useful purpose because plaintiff's inability to proceed against these defendants in the Pennsylvania forum has already been established. See *Goldlawr v. Shubert*, 169 F. Supp. 677, 686 (1958).

II.

Motion to Substitute the Executors of the Estate of Defendant Heiman.

CROSS-MOTION TO DISMISS AS TO HEIMAN FOR LACK OF JURISDICTION.

Marcus Heiman, a New York resident, was named as an original defendant in the action instituted in Pennsylvania. Although he died in September of 1957, the order of March 1959 included Heiman among the defendants as to whom the action was transferred for lack of venue.

Heiman was not found in and had no agents in Pennsylvania. *Goldlawr v. Shubert*, 169 F. Supp. 677, 682 (1958). See Clayton Act § 4, 38 Stat. 731 (1914), 15 U. S. C. § 15 (1958). He was never served personally in Pennsylvania or any other place. The obvious lack of personal jurisdiction over Heiman and the resulting invalidity of the transfer under 28 U. S. C. § 1406(a) would alone impel this Court to grant the cross-motion to dismiss.

In addition, passing consideration of the cross-motion, it is doubtful whether Rule 25(a)(1), Fed. R. Civ. P., may be invoked to authorize substitution of the executors for a defendant who neither appeared nor was served with process. See *United States v. Field*, 25 Fed. Cas. 1067, No. 15,089 (C. C. S. D. N. Y. 1859), Note on Revivor, 14 Fed. 392 (1882); *cf. Carnes v. Strait*, 270 S. W. 2d 920 (Ark. 1954). Substitution at this late date would be particularly anomalous since the motion to transfer from Pennsylvania was interposed for the first time after Heiman's death. Therefore at no time during his life was he amenable to service of process in this action.

III.

Motions to Dismiss for Pendency of Another Action.

The original complaint in this action who filed in October of 1956. In February of 1957 plaintiff, who was unable to obtain a prompt hearing on its motion to amend, filed a second complaint. This second complaint added certain defendants and extended the period for which damages were claimed but was otherwise identical with the first complaint. Therefore when the Court in Pennsylvania ordered severance and transfer, two actions, identical in all respects, were docketed in this District, the first of the Pennsylvania complaints having, in the meantime, been amended.

The three remaining defendants, William Klein, Milton Shubert, and Sylvia W. Golde have moved for a dismissal of one of these actions on the ground that there is a similar

action pending. Plaintiff opposes the motion on the ground that its rights under the Statute of Limitations can best be protected by preserving both actions.

In order to protect plaintiff's interest and, at the same time, spare defendants the burden of duplicating their efforts in this cause, the two actions will be consolidated for the purpose of all further proceedings. See Rule 42(a), Fed. R. Civ. P.

Settle appropriate orders on notice for dismissal as to defendants Select Operating Corporation, United Booking Office, Inc., and Marcus Heiman and for consolidation of the actions against Milton Shubert, William Klein and Sylvia W. Golde.

Dated: New York, N. Y.
August 10, 1959.

/s/ EDMUND L. PALMIERI,
Edmund L. Palmieri,
U. S. D. J.